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IN THE  
**SUPREME COURT**  
OF THE  
**UNITED STATES**

OCTOBER TERM, 1912

---

SOUTHERN PACIFIC COMPANY,  
*Appellant,*

VS.

CITY OF PORTLAND,

*Appellee.*

No. 120

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*Appeal from the Circuit Court of the United States  
for the District of Oregon*

**BRIEF FOR APPELLANT**

---

**STATEMENT**

This is an appeal from the decree of the Circuit Court of the United States for the District of Oregon, entered April 18, 1910, dismissing the cause and complaint, and awarding costs and disbursements to the defendant.

The cause was heard upon the pleadings and evidence taken in open court. The testimony is set

out in the Transcript of Record, pages 38 to 478, and all of the exhibits are printed excepting Plaintiff's Exhibits "A," "C," "D," "V," "AA," "DD," "EE," "FF," "GG," "HH," "II," "JJ," "OO," "RR," "XX," "YY," "HHH," "4-f," "4-G," and Defendant's Exhibits 1, 2, 3, 4, 5 and 6. These exhibits are described at pages 39 to 41 of the Transcript of Record.

The bill of complaint, (Pages 2 to 17 Transcript of Record) in substance alleges:

That the complainant is a corporation duly authorized to transact the business of a common carrier by railroad, in Oregon, and as such is in possession of and operating a railroad from its depot and station in the yards of the Northern Pacific Terminal Company, at the north end of Fourth Street in the City of Portland, by way of Fourth Street southerly to Sheridan Street, thence southerly to the south boundary line of said city, and thence by way of Beaverton, Hillsboro, and Forest Grove, to a point at or near McMinnville, thence to Corvallis, Oregon, a distance of 96.5 miles;

That the City of Portland, ever since its incorporation in January, 1851, has been a municipal corporation and political subdivision of the State of Oregon, organized and existing under the laws of said state; and that said Fourth Street is, up to said Sheridan Street, and during all the times mentioned in the complaint, has been a public street within said City of Portland, and that the said

City of Portland, during all the times mentioned in the complaint, has been and now is a citizen of the State of Oregon, and as such claims to have jurisdiction over its streets, including Fourth Street;

After alleging the jurisdictional facts, it is further alleged that the Oregon Central Railroad Company, until January 9, 1906, had been a corporation organized under the laws of the State of Oregon, and as such authorized to construct, operate and maintain the railroad from the City of Portland, southerly, and that in aid thereof, Congress, on May 4, 1870, enacted a statute entitled, "An Act granting lands to aid in the construction of a railroad and telegraph line from Portland, Oregon, to Astoria and McMinnville, in the State of Oregon," and by that Act granted to the Oregon Central Railroad Company, its successors and assigns, a right of way through the public lands of the United States, of the width of one hundred feet on each side of said road. The provisions of this Act of Congress are specifically pleaded, together with compliance by the railroad company with the terms and provisions of the Act under which it was entitled to the provisions thereof.

That within the time required by this Act, to-wit, six years from May 4, 1870, and as a part of its completed and fully equipped road, it completed and equipped the first twenty miles thereof, beginning at a point at the north end of Fourth Street at its intersection of North Front Street, in the depot and

station grounds of said company, now within the yards of the Northern Pacific Terminal Company, and so completed and constructed the same under said Act of Congress, and under and pursuant to that certain ordinance of the City of Portland, No. 599, approved January 6, 1869, by way of Fourth Street, to Sheridan Street, and thence southerly over its own right of way acquired by purchase and condemnation, and under said Act of Congress, southerly to a point at or near Hillsboro, Oregon, on or before the 3rd day of January, 1872, and that the Oregon Central Railroad Company operated said line from said point at said north end of Fourth Street, by way of Forest Grove, to the Yamhill River, near McMinnville, Oregon, until on or about the 6th day of October, 1880;

That on January 6, 1869, the City of Portland, under and by virtue of the laws of the State of Oregon, and its charter then in effect, duly passed, and the same was duly approved by the Mayor, Ordinance No. 599, in words and figures as follows, to-wit:

"An Ordinance Authorizing the Oregon Central Railroad Company, of Portland, to lay a railway track and run cars over the same, within the City of Portland.

The City of Portland does ordain as follows:

#### Franchise—Route.

*Section 1.* The Oregon Central Railroad Company, of Portland, Oregon, is hereby authorized and permitted to lay a railway track and



run cars over the same along the center of Fourth Street, from the south boundary line of the City of Portland, to the north side of "G" Street, and as much farther north as said Fourth Street may extend or be extended, upon the terms and conditions as hereinafter provided.

### Grade and Repairs.

*Section 2.* The said railroad company shall grade to established grades, construct and maintain in good repair said street, at least six feet in width upon each side of the center line of said street, and as much wider as may be affected by said railway or the construction thereof, and shall do and perform said work and the improvement and the repair thereof in such manner and as often as the Common Council of the City of Portland may at any time provide for or require.

*Section 3.* The Common Council reserve the right to make or to alter regulations at any time as they deem proper for the conduct of the said road within the limits of the city, and the speed of railway cars and locomotives within said limits, and may restrict or prohibit the running of locomotives at such time and in such manner as they may deem necessary.

*Section 4.* All alterations of grades or streets required for laying said railroad track, and all improvements and repairs of the same for said purpose, shall be made at the expense of the said railroad company, and the same shall be made as may be provided by ordinance.

*Section 5.* It is hereby expressly provided that any refusal or neglect of the said Oregon Central Railroad Company to comply with the provisions and requirements of this ordinance, or any other ordinance passed in pur-



suance hereof, shall be deemed a forfeiture of the rights and privileges herein granted; and it shall be lawful for the Common Council to declare by ordinance, the forfeiture of the same, and to cause the said rails to be removed from said street.

Approved January 6th, 1869."

That said ordinance was then and there duly accepted by the Oregon Central Railroad Company therein designated, and the said Oregon Central Railroad Company, its successors and assigns, including the complainant, Southern Pacific Company, as lessee of said property and in the possession and operation of the same, have at all times fully complied with the terms and conditions of said ordinance, and the said Oregon Central Railroad Company, its successors and assigns, have expended, upon the faith of said ordinance, in the construction of said road and in improvements ordered and directed by the said City of Portland, and in the renewal of said road from the north end of said Fourth Street to Sheridan Street, in said city, a sum in excess of \$133,483, and the said Southern Pacific Company, ever since the lease of said property by the Oregon and California Railroad Company, has continuously operated and maintained said railroad on said Fourth Street as required by said ordinance, and as required by the business of said railroad company in operating said railroad from Portland to Corvallis and return;

That on January 6th, 1869, when said Ordinance No. 599 was passed and approved, the charter of

the City of Portland then in effect was the Act of the Legislative Assembly of October 14th, 1864, found at pages 3 to 31 of the Session Laws for that year;

That on October 14th, 1862, the Legislative Assembly of the State of Oregon duly passed, and the same was approved by the Governor, an act entitled, "An Act providing for private incorporations and the appropriation of private property therefor." Section 24 of that Act was and is Section 5077 of Bellinger & Cotton's Annotated Codes and Statutes of Oregon, and Section 25 of said Act was and is now Section 5078 of Bellinger & Cotton's Annotated Codes and Statutes of Oregon, which are now Sections 6841 and 6842 of Lord's Oregon Laws, as follows:

*"Section 6841. Public Grounds, Streets, etc., May be appropriated.*

When it shall be necessary or convenient in the location of any road herein mentioned to appropriate any part of any public road, street or alley, or public grounds, the county court of the county wherein such road, street, alley or public grounds may be, unless the same be within the corporate limits of a municipal corporation, is authorized to agree with the corporation constructing the road, upon the extent, terms, and conditions upon which the same may be appropriated or used, and occupied by such corporation, and if such parties shall be unable to agree thereon, such corporation may appropriate so much thereof as may be necessary and convenient, in the location and construction of said road."

**"Section 6842. Streets, etc., in Corporate Towns, Proceedings to Appropriate.**

Whenever a private corporation is authorized to appropriate any public highway or grounds as mentioned in the last section, if the same be within the limits of any town, whether incorporated or not, such corporation shall locate their road upon such particular road, street, or alley, or public grounds, within such town as the local authorities mentioned in the last section and having charge thereof shall designate; but if such local authorities shall fail or refuse to make such designation within a reasonable time when requested, such corporation may make such appropriation without reference thereto."

The Act of October 14th, 1862, containing among other provisions, the above sections, took effect pursuant to Section 51 thereof, which is as follows:

"Owing to the necessity of certain corporations being formed under this Act immediately, so as to commence operations before the winter rains set in, this act shall take effect and be in force from and after its approval by the Governor."

The bill of complaint further alleges the incorporation of the Oregon & California Railroad Company under the laws of Oregon, on March 16, 1870, and that it has ever since been and is now such corporation, authorized to construct, operate, acquire, own, hold, use, and lease its railroads and other property and franchises owned by it in the State of Oregon, and that on the 6th day of October, 1880, the Oregon Central Railroad Company, being

duly authorized, sold, assigned, transferred and conveyed to the Oregon & California Railroad Company, authorized to accept and receive the same, all the property of the Oregon Central Railroad Company, including its line of railroad then constructed extending from Portland to St. Joseph, Oregon, a point on the Yamhill River at or near McMinnville, in the State of Oregon, together with its rights and franchises, including the said franchise granted under said Act of Congress, and including the said franchise granted to said Oregon Central Railroad Company under Ordinance No. 599, aforesaid, and including said railroad track on said Fourth Street; and the Oregon & California Railroad Company, ever since October 6th, 1880, and up to the first day of July, 1887, continuously operated and maintained said railroad and tracks, commencing at the north end of Fourth Street, as aforesaid, thence on Fourth Street to Sheridan Street, thence southerly to Corvallis by way of Forest Grove and McMinnville; and the said City of Portland, during all said times, recognized the said Oregon & California Railroad Company and the said Southern Pacific Company under its lease, as rightfully in the possession of said franchise on said Fourth Street, and as obligated to perform the conditions of said Ordinance No. 599, and as entitled to the benefits and burdens of the franchise thereby granted, and so continued to recognize said rights and to impose said burdens until on or about the passage of that certain pretended ordinance No.

16491, entitled, "An Ordinance prohibiting the operation of steam locomotives and freight cars on Fourth Street between Glisan Street and the southerly limits of the City of Portland, after eighteen months from the date of the passage of this ordinance, and providing a penalty for the violation thereof," which said ordinance was passed May 1, 1907;

That on July 1, 1887, the Oregon & California Railroad Company duly assigned, transferred and leased to complainant, for the term of forty years from that date, its lines of railroads, including the line of the Oregon Central Railroad Company and the Oregon & California Railroad Company from its northerly terminus at the intersection of Fourth Street and North Front Street, in the City of Portland, along Fourth Street to Sheridan Street in said city, thence by way of Beaverton, Hillsboro, Forest Grove and McMinnville, to Corvallis, together with all the rights and franchises granted to the Oregon Central Railroad Company under said Ordinance No. 599, and that complainant thereupon entered into the open, notorious and exclusive possession of said railroad and franchises and rights granted under said Ordinance No. 599, and has ever since been and is now operating and maintaining as a common carrier for hire, and serving the people and business of the counties of Multnomah, Washington, Yamhill, Polk and Benton, in the State of Oregon, the said railroad between said points, over

said Fourth Street, and during all said times operating steam locomotives and cars over the same, as required and authorized by law;

That notwithstanding the passage of Ordinance No. 599, and its acceptance by the Oregon Central Railroad Company, its successors and assigns, and the operation of said railroad over said Fourth Street in accordance with its terms, the Common Council of the City of Portland attempted to pass, and did pass, on May 1, 1907, Ordinance No. 16491, in words and figures as follows:

"An Ordinance prohibiting the operation of steam locomotives and freight cars on Fourth Street between Glisan Street and the southerly limits of the City of Portland, after eighteen months from the date of the passage of this ordinance, and providing a penalty for the violation thereof.

"The City of Portland does ordain as follows:

"*Section 1.* It shall be unlawful for the Oregon Central Railroad Company of Portland, Oregon, its successors, assigns, or their lessees, or other person, firm or corporation, to run or operate steam locomotives or freight cars over, upon or along Fourth Street between Glisan Street and the southerly limits of the City of Portland, from and after eighteen months from the final passage or approval of this ordinance, excepting freight cars for the reconstruction, repair or maintenance of the railway lawfully and rightfully on said street.

"*Section 2.* Any violation of the provisions of this ordinance by the owners, officers, agents or employees of said Oregon Central Railroad Company, or its successors, assigns, or lessees or any other person, firm or corporation, by so running or operating steam locomotives or



freight cars (other than those excepted in section 1 hereof), or attempting to run or operate the same on said Fourth Street after the time mentioned in section 1 of this ordinance, shall be punishable by a fine of not less than \$250.00 nor more than \$500.00, or by imprisonment for nor more than six months, or by both such fine and imprisonment, and each day's running or operating, or attempting to run or operate such steam locomotives or freight cars, shall constitute a separate offense and such violation shall be deemed a forfeiture of any and all rights and privileges claimed by said Oregon Central Railroad Company with respect to the operation of any railway on said street.

*"Section 3.* This ordinance shall not be construed so as to recognize, assent to, affirm, confirm, ratify or extend any right, franchise or privilege relative to the maintenance or operation of any railway, or the use, operation or running of any railway car or cars, motor or motors, locomotive or locomotives, or other railway vehicle or vehicles in, on, over, along or upon said Fourth Street heretofore, now or hereafter claimed, alleged or set up by any person, persons, firm or corporation."

That on Nov. 16, 1908, the city, acting by and through its City Attorney and Chief of Police, caused to be filed in the Municipal Court of the City of Portland, a criminal complaint charging the Southern Pacific Company and its General Manager, James P. O'Brien, with a violation of Ordinance No. 16491, in that the company, on November 16, 1908, and its Manager, as such officer, wilfully and unlawfully ran and operated steam railway locomotives upon and along Fourth Street, between the south boundary line of said city, and the south line

of Glisan Street in said city, and within the corporate limits of the city, contrary to the provisions of this ordinance.

That pursuant to this complaint the Municipal Court caused to be issued a warrant for the arrest of James P. O'Brien, the General Manager of complainant, and the Chief of Police caused his arrest; thereupon, upon the appearance of said James P. O'Brien in court in person as well as by his counsel, he was allowed to go upon his own recognizance, and the case was continued for further hearing, and the same is now pending in that court.

It is alleged that the City of Portland, acting by and through its Mayor and Chief of Police, threatens to and will unless restrained by the court, cause other complaints to be filed charging the Southern Pacific Company and its General Manager with pretended violations of Ordinance No. 16491, of like tenor and effect, and will unless restrained, annoy, vex and harass the complainant and its General Manager with a multiplicity of criminal actions for the pretended violation of this ordinance, thereby intending to and trying to prevent the operation of the trains of the complainant, and particularly its motive power used in the operation thereof, to-wit, the steam engines over and upon and along said Fourth Street in said City of Portland, and all freight trains or cars;

That heretofore the Legislative Assembly of the State of Oregon duly enacted an act to incorporate



the City of Portland, approved January 23rd, 1903, and the said City of Portland ever since has been and is now acting under the terms and provisions of said Act, and is demanding that the said Southern Pacific Company discontinue the operation of its said trains under said Ordinance No. 599, and accept and receive from said City of Portland, under said charter, an ordinance for a limited term by which said Southern Pacific Company may be permitted to operate and move street cars and other passenger cars on and over said Fourth Street by means of electrical power, and not otherwise, and for which it shall pay an annual revenue to the City of Portland for said franchise, which said sum so to be paid is required to be exacted by said charter as special revenue, and not as a license or privilege tax, but that under said proposed ordinance said Southern Pacific Company would not be permitted to operate its railroad trains and move its freight over its line of railroad from Corvallis to the northerly end of said Fourth Street, and along Fourth Street, or to operate any trains on said Fourth Street moved by steam engines, nor to move any freight thereon whatsoever.

The special provision of the charter of the City of Portland, under the Act of January 23, 1903, referred to, is as follows:

"The Council has power and authority by ordinance, duly passed, to agree with any corporation, firm or person constructing a commercial railroad and desiring to enter the city, upon the extent, terms and conditions upon

which the streets, alleys or public grounds of the city may be appropriated, used or occupied by such railroad, and upon the manner, terms and conditions under which the cars and locomotives of such railroad may be run over and upon such streets, alleys, and public grounds; such agreement shall be subject to the provisions and requirements of Sections 95, 97, 100 and 101 of this charter. No exclusive right for the aforesaid purposes shall be granted to any corporation, firm, or person, and the use of all such rights shall at all times be subject to regulation by the Council. In addition to the other requirements of this charter every ordinance granting such right shall be upon the condition that such grantee shall allow any other railroad company to use, in common with, the same track or tracks upon obtaining the consent of the Council, expressed by ordinance, each paying an equitable and proper portion for the construction and repair of the tracks and appurtenances used by such railroad companies jointly."

It is further alleged that there is no other provision in the charter under or by which a commercial railroad can acquire the right to construct and operate a railroad upon the streets, alleys or public grounds of said city, and if Ordinance No. 16491 is enforced and enforcible, it will be impossible for complainant to operate any railroad from the intersection of Sheridan Street with said Fourth Street to its station and terminals at the intersection of Fourth Street with North Front Street, in said city, and complainant will be compelled to discontinue the operation of its trains into the City of Portland,

thereby causing great and irreparable damage to its business and to the public;

That said complainant has not, nor is it possible to obtain or provide any terminal, station, or siding at any point within the city along the line of its said railway, or accessible thereto, from the intersection of Sheridan Street with Fourth Street, to the south boundary limits of said City of Portland, and that the trains of complainant, from Corvallis and all points between Portland and Corvallis, could not be operated or brought into said city, or its business as a common carrier conducted, if said Ordinance No. 16491 is enforced or enforceable, excepting by construction of about 10.17 miles of railroad from Beaverton, via Oswego, across the Willamette River, to Willsburg, Oregon, at the estimated cost of \$911,-314.37, and thence to the east end of the Steel Bridge across the Willamette River, owned by the Oregon Railroad and Navigation Company, and thence across said river to the intersection of Fourth Street with North Front Street, by the northerly terminus of said railroad constructed by the Oregon Central Railroad Company;

That in and by the Act to incorporate the City of Portland of January 23, 1903, it was provided by Section 106 thereof as follows:

"All franchises or privileges heretofore granted by the city, which are not in actual use or enjoyment, or which the grantees thereof have not in good faith commenced to exercise, are hereby declared forfeited and of no valid-

ity, unless said grantees or their assigns shall, within six months after this charter takes effect, in good faith, commence the exercise or enjoyment of such grant or franchise. Nothing in this charter contained shall affect the validity of any franchise, right or privilege in actual use or enjoyment heretofore given or granted by any former or the present city of Portland, or by the City of East Portland, or by the City of Albina, and the same shall be and continue in force and effect as given or granted by said cities or either of them."

And it is alleged that at that time, and when said charter took effect, the complainant was then and there operating its line of railroad over said Fourth Street, as aforesaid, under said Ordinance No. 599, and was in the enjoyment of the franchise thereby granted;

That the Oregon Central Railroad Company being thereunto duly authorized, on October 6, 1880, so executed its deed to the Oregon & California Railroad Company in consideration of the covenant and agreement upon the part of the Oregon & California Railroad Company, its successors and assigns, that they would pay or cause to be paid and discharged all lawful indebtedness of the said Oregon Central Railroad Company, which then exceeded the full value of the property conveyed, and which said indebtedness has been fully paid and discharged by the said Oregon & California Railroad Company; and the said conveyance was authorized by the unanimous vote of the stock-

holders and directors of said Oregon Central Railroad Company authorizing the dissolution of said Oregon Central Railroad Company, the settling of its business and disposing of its property, as provided by Sections 5068 and 5070, 11 Bellinger & Cotton's Annotated Codes and Statutes of Oregon, then in effect, and that then and thereby, and by virtue of said conveyance and said resolutions authorizing the dissolution of said Oregon Central Railroad Company, the said Oregon & California Railroad Company acquired all the property, franchises and rights of the Oregon Central Railroad Company, including its rights and franchises granted by said Ordinance No. 599, as aforesaid.

Sections 5068 and 5070, 11 Bellinger & Cotton's Annotated Codes and Statutes of Oregon, are now Sections 6699 and 6701 Lord's Oregon Laws, but when said dissolution was effected, and said conveyance made, were as follows:

*"Section 5068.* Corporations continue, after dissolution, for certain purposes. All corporations that expire by limitation specified in their Articles of Incorporation, or are dissolved by virtue of the provisions of Section 5070, or are annulled by forfeiture or other cause by the judgment of a court, continue to exist as bodies corporate for a period of five years thereafter, if necessary for the purpose of prosecuting or defending actions, suits, or proceedings by or against them, settling their business, disposing of their property, and dividing their capital stock, but not for the purpose of continuing their corporate business."

*"Section 5070.* Majority may determine



amount of stock or dissolve corporation.—Any corporation organized under the provisions of this chapter may, at any meeting of the stockholders which is called for such purpose, by a vote of the majority of the stock of such corporation, increase or diminish its capital stock or the amount of the shares thereof, or authorize the dissolution of such corporation, and the settling of its business and disposing of its property, and dividing its capital stock in any manner it may see proper."

It is further alleged that the complainant, in order to accommodate the public and transact its business as a common carrier, is required to operate and is now operating over and along said Fourth Street daily, ten regular passenger trains and two regular freight trains, and is moving both intra and interstate commerce over and upon its said railroad tracks, and that the franchise and right to operate said railroad under said Ordinance No. 599, in accordance with the terms thereof, exceeds the jurisdictional amount.

Complainant further alleges that Ordinance No. 16491 is void and of no force and effect, in this:

(a) That thereby the City of Portland would take property of the Southern Pacific Company without just or any compensation, and without the consent of the Southern Pacific Company, all in violation of Section 18, Article I, of the Constitution of the State of Oregon, which provides that, "Private property shall not be taken for public use, nor the particular services of any man be demanded without just compensation; nor, except in

case of the state, without such compensation first assessed and tendered."

(b) Said Ordinance No. 16491 is void and of no force and effect in this: that it violates Section 21, Article I of the Constitution of the State of Oregon, which provides, "No ex post facto law, or law impairing the obligations of contracts, shall ever be passed, the taking effect of which shall be made to depend upon any authority, except as provided in this Constitution: Provided, that laws locating the capital of the state \* \* \* may take effect or not, upon a vote of the electors interested."

(c) Said Ordinance No. 16491 is void and of no force and effect in this: that it violates the Fourteenth Amendment to the Constitution of the United States, which provides among other things as follows: "All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the state wherein they reside. No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any state deprive any person of life, liberty, or property, without due process of law, nor deny to any person within its jurisdiction the equal protection of the laws," and said Ordinance is void particularly in this, that its enforcement will deprive the Southern Pacific Company and the Oregon & California Railroad Company of its property, to-wit, its rights under said Ordinance No. 599, and under the said Act of Congress of May 4, 1870, without due process of law, and is a denial to the Southern Pacific Company and the Oregon & California Railroad Company of the equal protection of the laws.

(d) Said Ordinance No. 16491 is void and of no force and effect in this: that it violates Article I, Section 8, paragraph 3, of the Con-

stitution of the United States, which provides, "The Congress shall have power to regulate commerce with foreign nations and among the several states, and with the Indian tribes," and is violative of Article I, Section 8, of the Constitution of the United States, which provides: "The Congress shall have power to make all laws which shall be necessary and proper for carrying into execution the foregoing powers, and all other powers vested by this Constitution in the government of the United States, or in any department or officer thereof," and particularly in this, that the enforcement of said ordinance by said City of Portland will interfere with, restrain and prevent the movement of interstate commerce, and is a burden upon said interstate commerce so being carried by said Southern Pacific Company between Corvallis and said northerly terminus of said railroad at the intersection of Fourth Street and North Front Street, and to connection with other carriers doing business at said last named point, and impairs the rights granted by said Act of Congress of May 4th, 1870.

(e) Said Ordinance No. 16491 is void and of no force and effect in this, that it provides for excessive, unusual penalties, fines and punishments, and thereby deprives the Southern Pacific Company and its officers and agents, and other citizens of the United States, of the equal protection of the law, and thereby takes the property of the complainant without due process of law.

(f) Said Ordinance No. 16491 is void and of no force and effect in this; that it violates Section 10, Article I, of the Constitution of the United States, which, among other things, provides, "No state shall pass any bill of attainder, ex post facto law, or law impairing the obligation of contracts," and that the said



ordinance attempts to and if enforced will impair the obligation of the contract created between the Oregon Central Railroad Company, its successors and assigns, and the said City of Portland, under said Ordinance No. 599, heretofore set out.

(g) The said Ordinance No. 16491 is void and of no force and effect in this, that it is unreasonable, arbitrary, and oppressive, and particularly in this, that although said railroad has been continuously operated over said Fourth Street as aforesaid, with steam locomotives, for thirty-nine years, there has never been any serious accident or injury caused to anyone thereby, and by reason of the physical location of the said City of Portland, and the location of the line of railroad under said Act of Congress of May 4th, 1870, and under the Articles of Incorporation of the Oregon Central Railroad Company, it was and is physically impossible to construct, locate or operate a line of railroad into the City of Portland from the south boundary thereof into the terminals and station of the said Southern Pacific Company, now within the yards of the Northern Pacific Terminal Company, over or upon any other route, line or street other than said Fourth Street where the same has been so continuously operated and maintained.

Upon filing the bill of complaint, the court made an order restraining the defendant and its officers from attempting to enforce the provisions of Ordinance No. 16491, or from attempting to prosecute the complaint described in the bill of complaint, or any other action or proceeding to enforce the ordinance or any penalty for the alleged violation thereof; which order was contained in effect by

the trial court by a decree, until this appeal could be heard and determined, or until otherwise ordered by the court.

The defendant filed its answer on March 31, 1909, admitting the incorporation of complainant, and that the defendant was a municipal corporation, and admitting the jurisdictional averments of the bill of complaint, and that the Oregon Central Railroad Company was a corporation until about the year 1906, and had authority to construct and operate a railroad, and that on January 6, 1869, Ordinance No. 599 was duly approved, and that the copy of the ordinance set out in the bill of complaint is a correct copy thereof, and that the Oregon Central Railroad Company accepted said ordinance.

The answer admits that the Oregon & California Railroad Company is duly incorporated under the laws of the State of Oregon, and also admits that Ordinance No. 16491 is as set out in the bill of complaint; admits the attempted prosecution of the complainant and its General Manager, and the pendency of that proceeding, and admits that the City of Portland was incorporated under the Act of January 23, 1903, and that the same is now in force, and admits the provisions of that Act set out in the complaint; admits that the incorporators of the Oregon Central Railroad Company attempted to effect a dissolution of that company; admits that the complainant operates ten or more passen-

ger trains, and two or more freight trains over said Fourth Street daily.

Further answering the defendant alleges that Ordinance No. 599 went into effect January 6th, 1869, and that at that time the population of the City of Portland was approximately 7,500 persons, and the city was divided by the Willamette River into two parts, commonly known as the East Side and the West Side, and that on the West Side is the principal business district of the city, and a large residence district, furnishing homes for upwards of 75,000 persons; that Fourth Street runs north and south; that between Fourth Street and the Willamette River, and parallel therewith, are Third, Second, First, and Front Streets; westerly from Fourth Street and parallel therewith are many streets numbered consecutively in an ascending scale; that at the time of the passage of Ordinance No. 599, the business district of the city was along Front Street and the Willamette River; that at that time no business houses or commercial enterprises were located on Fourth Street, and there was practically no population upon Fourth Street, or that the population was so situated with reference to it, that the said Fourth Street was not used or occupied for general public travel, and said Fourth Street was not graded, paved, or open or in condition for public travel, and that the entire district adjoining said street and westerly therefrom was substantially without population;

That when Ordinance No. 16491 was passed, May 1, 1907, the population of the City of Portland was upwards of 225,000, and the business district bounded as follows: upon the East by Grand Avenue on the East of the Willamette River, upon the South by Jefferson Street, upon the West by Thirteenth Street, and upon the North by the Willamette River; that the business center of the business district of the city is upon Front, First, Second, Third, Fourth, Fifth and Sixth Streets, between and where they are intersected by Morrison, Alder, Washington, Stark and Oak Streets; that along Fourth Street for many blocks are business houses of many kinds, including hotels, schools, wholesale houses, shops, stores, department stores, County Court House and City Hall, and upon this street are located many of the principal business houses of the City of Portland;

That Fourth Street is also intersected by street car lines running in an easterly and westerly direction along and upon Glisan Street, Burnside Street, Washington Street, and Morrison Street, and said street car lines afford transportation facilities for a majority of the population of the west side and to and from the business section of the west side and the homes of upward of seventy five thousand persons living upon the west side, and during *fifteen or sixteen hours* of each day upon said intersecting streets, upwards of a dozen cars cross said Fourth Street every minute; that Fourth Street is one of

the principal arteries of travel of the City of Portland and constantly *every day* many thousand people in the pursuit of their usual business, and hundreds of teams, and vehicles, engaged in ordinary business, travel upon and across said Fourth Street, and there is *almost continually* a great congestion upon said Fourth Street at its intersection with Glisan, Burnside, Stark, Washington and Morrison Streets;

That there are large water mains, gas mains and other utilities serving the public, crossing and along said Fourth Street in the business center of said city, which are disturbed, broken and partially destroyed by the vibration of the trains on said Fourth Street, to the great injury and damage of the public; that just south and rising from the center of the business district there is a pronounced ascent or grade southerly along said Fourth Street, and at several points along the line of railroad upon said Fourth Street the ascent is about four per cent, or an ascending grade of four feet in every running hundred feet;

That notwithstanding this the complainant has at all times in the past, and now does, run and operate over said railroad tracks upon Fourth Street, heavy trains of freight cars, drawn by large steam locomotives; that the operation of said cars and locomotives constitute and are and for several years last past, and at the time of the enactment of said Ordinance No. 16491, have been a grave and con-

stant menace to the safety, lives and limbs of the people of the City of Portland and the public generally, and a serious and constantly increasing impediment to traffic and is a check upon the growth and development of said city; that the noise, roar, vibration and the emissions of smoke, steam, soot and cinders incidental to the operation of said cars and locomotives, were and are a source of constant danger to property, and a constant and increasing source of danger, discomfort and inconvenience to the lives, health, safety and comfort of the citizens of Portland, and of the public generally; that said Ordinance No. 16491 was enacted by the Council of the City of Portland *under and by virtue of the authority of and pursuant to the reserved powers in said Ordinance No. 599, and in the proper and reasonable exercise of the police powers of the City of Portland for the protection of property and the lives, health, safety and comfort of the citizens thereof, and the public generally.*

To this answer complainant filed its general replication on April 30, 1909, and thereafter much testimony was taken in open court. On April 4, 1910, the court delivered a written opinion, (Pages 27-31 Transcript) as a result of which a decree of dismissal was entered. Complainant then filed its petition for appeal, and therewith an Assignment of Errors, which may be summarized in the following:



## *SPECIFICATION OF ERRORS*

### I.

That said Circuit Court erred in deciding that the plaintiff is not entitled to the relief prayed for in its bill of complaint, or to any relief whatever in said cause.

### II.

That said Circuit Court erred in dismissing said cause and said bill of complaint.

### III.

That said Circuit Court erred in refusing to grant to plaintiff the relief prayed for in its bill of complaint herein.

### IV.

That said Ordinance No. 16491 passed by the Common Council of the City of Portland on May 1, 1907, is in contravention of Section 18, Article I, of the Constitution of the State of Oregon, which provides:

"Private property shall not be taken for public use, nor the particular services of any man demanded without just compensation; nor, except in case of the state, without such compensation first assessed and tendered."

### V.

That said Ordinance No. 16491 passed by the Common Council of the City of Portland on May 1, 1907, is in contravention of Section 21, Article I, of the Constitution of the State of Oregon, which provides:

"No ex post facto law, or law impairing the obligations of contracts, shall ever be passed, the taking effect of which shall be made to

depend upon any authority, except as provided in this Constitution; Provided, that laws locating the capital of the state \* \* \* may take effect or not, upon a vote of the electors interested."

## VI.

That said Ordinance No. 16491 passed by the Common Council of the City of Portland on May 1, 1907, is in contravention of the Fourteenth Amendment to the Constitution of the United States, which provides among other things as follows:

"All persons born or naturalized in the United States and subject to the jurisdiction thereof, are citizens of the United States and of the state wherein they reside. No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any state deprive any person of life, liberty, or property, without due process of law, nor deny to any person within its jurisdiction the equal protection of the laws."

And said ordinance is void particularly in this, that its enforcement will deprive the Southern Pacific Company and the Oregon & California Railroad Company of its property, to-wit, its rights under said Ordinance No. 599, and under the Act of Congress of May 4, 1870, without due process of law, and is a denial to said Southern Pacific Company and said Oregon & California Railroad Company of the equal protection of the laws.

## VII.

Said Ordinance No. 16491 passed by the Common Council of the City of Portland on May 1, 1907, violates Article I, Section 8, para-

graph 3, of the Constitution of the United States, which provides:

"The Congress shall have power to regulate commerce with foreign nations and among the several states, and with the Indian tribes," and is violative of Article I, Section 8, of the Constitution of the United States, which provides:

"The Congress shall have power to make all laws which shall be necessary and proper for carrying into execution the foregoing powers, and all other powers vested by this Constitution in the government of the United States, or in any department or officer thereof," and particularly in this, that the enforcement of said ordinance by said City of Portland will interfere with, restrain and prevent the movement of interstate commerce, and is a burden upon said interstate commerce so being carried by said Southern Pacific Company between Corvallis and said northerly terminus of said railroad at the intersection of Fourth Street and North Front Street, and to connection with other carriers doing business at said last named point, and impairs the rights granted by said Act of Congress of May 4th, 1870.

### VIII.

Said Ordinance No. 16491 is void and of no force and effect in this, that it provides for excessive, unusual penalties, fines and punishments, and thereby deprives the Southern Pacific Company and its officers and agents, and other citizens of the United States, of the equal protection of the law, and thereby takes the property of the complainant without due process of law.

## IX.

Said Ordinance No. 16491 is void and of no force and effect in this, that it violates Section 10, Article I, of the Constitution of the United States, which among other things provides: "No state shall pass any bill of attainder, ex post facto law, or law impairing the obligation of contracts," and that the said ordinance attempts to and if enforced will impair the obligation of the contract created between the Oregon Central Railroad Company, its successors and assigns, and the said City of Portland, under said Ordinance No. 599.

## X.

The said Ordinance No. 16491 is void and of no force and effect in this, that it is unreasonable, arbitrary, and oppressive, and particularly in this, that although said railroad has been continuously operated over said Fourth Street as aforesaid, with steam locomotives for thirty-nine years, there has never been any serious accident or injury caused to anyone thereby, and by reason of the physical location of the said City of Portland and the location of the line of railroad under said Act of Congress of May 4th, 1870, and under the Articles of Incorporation of the Oregon Central Railroad Company, it was and is physically impossible to construct, locate or operate a line of railroad into the City of Portland from the south boundary thereof, into the terminals and station of the said Southern Pacific Company, now within the yards of the Northern Pacific Terminal Company, over or upon any other route, line or street other than said Fourth Street, where the same has been so continuously operated and maintained.

## XI.

Said Ordinance No. 16491 is in violation of subdivision 3 of Section 73 of the Charter of the City of Portland, which provides:

"The Council has power and authority, subject to the provisions, limitations and restrictions in this charter contained \* \* \* to provide for the punishment of a violation of any ordinance of the city by fine or imprisonment not exceeding Five Hundred Dollars, or six months imprisonment, or both, or by forfeiture, as penalty."

The testimony taken shows substantially this state of facts:

That on April 15, 1868, the Oregon Central Railroad Company commenced the construction of its line of railroad from the North end of Fourth Street, along Fourth Street, to the Southerly boundary limits of the city, and continued such construction until it reached a point at or near McMinnville, on the Yamhill River, and that thereafter the Oregon & California Railroad Company extended the road to Corvallis, Oregon, a distance of some 97 miles from Portland; that at the time the road was constructed along Fourth Street the business of the city was to the East thereof, in the main; that the railroad company, after the passage of Ordinance No. 599, January 6, 1869, accepted the terms and provisions of that ordinance, and made the improvements required by that ordinance, and that its successor, the Oregon & California Railroad Company, and the Southern Pacific Company, ever since that date, have continuously complied

with the terms and provisions of that ordinance, and have expended in that behalf approximately the amount of money alleged in the complaint.

That the population of the City of Portland in 1869 was 8928, as shown by the local directories, but that the federal census of 1870 showed a population of 8300; that on January 2, 1869, the buildings along Fourth Street were mainly wooden buildings, sparsely located; that the Court House block had a school and a one-story cottage thereon, and that there was no business on that street; that the buildings on that street were residence buildings, and that it was an earth street; that the amount of travel on Fourth Street at that time was small; the street was almost impassable for hauling.

There was offered in evidence, also, the charter of the City of Portland as it was in 1864, (See Pages 64-88 Transcript). This was introduced to show that the City of Portland at the time of the passage of Ordinance No. 599, had no authority to pass this ordinance excepting pursuant to and under the authority of Sections 24 and 25 of the Act of the legislature of the State of Oregon, of October 14, 1862, being Sections 6841 and 6842 Lord's Oregon Laws, *supra*.

The testimony further tends to show that from the time the road was first begun to be operated, down to the date of trial, there had been but two accidents resulting in death, one at Burnside Street,



and one between Stark and Morrison Streets; one an ex-railroad man who had attempted to board a freight train, and who was under the influence of liquor, missed his footing and fell under the train; the other was a man attempting to board an excursion train while the train was in motion. This man was also under the influence of liquor. That there had been a few accidents where parties driving wagons were thrown out, but in every one of these cases it was by reason of their backing up against the train while the train was in motion, or driving alongside of the train, getting too close. These were none of them serious. There was a collision with a car of the Portland Railway Light & Power Company, investigated by the Railroad Commission, which found that the motorman was careless in operating his car. With the exception of these accidents, and that of a man riding in his wagon, who was thrown out while he was attempting to drive in front of the engine, there has never been any collision of any street car or any wagon or any vehicle of any kind during the time covered by the testimony of the Superintendent of the road, who testified in the case,—a period of twenty-six years.

Superintendent L. R. Fields, who had thus operated the property for twenty-six years, and had been connected with the road for thirty-four years, testified that the trains, both freight and passenger, could be operated with reasonable safety to the

people having occasion to cross the streets, the people having occasion to ride in the cars across the streets, and to footmen and others of the public, with the city having its present population, say 225,000, or even twice as large, or more, or for that matter, in a city with any number of people. (Page 96 Transcript) That no gates or signals have ever been placed at the intersection of any of the cross streets, and no requirements on the part of the city to install electric bells at any of these crossings, to give warning of the approach of any of these trains. That 75% of the business over the road was passenger, and about 25% freight; that the maximum grade on Fourth Street was 3.4%, the steepest part of the grade being just above the City Hall.

The testimony further tended to show, and is, we think, substantially conclusive upon that point,—that there never had been any accident on this street as a result of *the operation of the line*; that the accidents when they did occur, were such as would happen or might happen anywhere, and at any time, and that they were few in number and unimportant in character.

The record shows the dissolution of the Oregon Central Railroad Company under the laws of the state, and the transfer and conveyance of all of its property to the Oregon & California Railroad Company, including the franchise granted by Ordinance No. 599.

The record also shows that the Oregon & California Railroad Company leased its railroad to the complainant, and that it was duly authorized by the laws of the state, and its Articles of Incorporation, to execute the lease.

There is but little conflict in the testimony as to the condition of Fourth Street, the population of the city, and other physical facts as they existed January 6, 1869, and as they exist at the present time. There was and is but little dispute in the evidence as to the fact that no serious accidents resulted from the operation of the line on Fourth Street during the time it has been operated. There was testimony upon behalf of the city tending to show that the noise of the locomotives tended to interfere for a few moments with the transaction of public business in the City Hall. There was no testimony offered on behalf of the city tending to show that the movement of freight traffic, or the operation of trains by locomotives, *at restricted periods at night, would not remove all these objections, and would not remove any possible risk of accident to careless footmen or other persons crossing the tracks.*

A number of ordinances were introduced to show recognition by the City of Portland of the rights of the Oregon & California Railroad Company and Southern Pacific Company, Lessee; that the Oregon & California Railroad Company was the owner of the franchise granted by Ordinance No. 599, and

that Southern Pacific Company, as its lessee, was entitled to exercise and enjoy all the rights granted thereby.

The evidence is overwhelming to the point that the City of Portland has recognized the Oregon & California Railroad Company as the assignee and successor in interest of the Oregon Central Railroad Company, and as such entitled to the rights and privileges granted by this ordinance. This testimony was offered for the purpose of showing that the City of Portland had recognized the assignability of this franchise, notwithstanding no words of express assignment are found in the ordinance.

The controlling questions in this case may be grouped and stated as follows:

## *POINTS AND AUTHORITIES*

### *I.*

The legislature of the State of Oregon, representing the public at large, under the provisions of the Act of October 14, 1862, by Sections 24 and 25 thereof, now Sections 6841 and 6842 of Lord's Oregon Laws, granted to the Oregon Central Railroad Company, its successors and assigns, the right, in furtherance of the public duties cast upon the railroad company, to construct, locate and operate its railroad in and along Fourth Street, subject to the right of the City of Portland, under the authority granted by this statute, to consent to the extent, terms and conditions upon which such right should

be exercised, but if the city did not consent, then such right was to be exercised in any event.

At the time Ordinance No. 599 was passed, evidencing the consent of the City of Portland, upon January 6, 1869, the charter of the City of Portland, then in effect, was the Act of October 14, 1864, pages 64 to 88 Transcript of Record. Under that charter the Legislative Assembly delegated no power or authority to the City of Portland in respect to this matter, and the exclusive authority was vested in the Legislative Assembly, under Sections 6841 and 6842 of Lord's Oregon Laws, which are as follows:

*"Section 6841. Public Grounds, Streets, etc., May be Appropriated.*

When it shall be necessary or convenient in the location of any road herein mentioned to appropriate any part of any public road, street, or alley, or public grounds, the county court of the county wherein such road, street, alley, or public grounds may be, unless the same be within the corporate limits of a municipal corporation, is authorized to agree with the corporation constructing the road, upon the extent, terms, and conditions upon which the same may be appropriated or used, and occupied by such corporation, and if such parties shall be unable to agree thereon, such corporation may appropriate so much thereof as may be necessary and convenient, in the location and construction of said road."

*"Section 6842. Streets, etc., in Corporate Towns, Proceedings to appropriate.*

Whenever a private corporation is authorized to appropriate any public highway or grounds as mentioned in the last section, if

the same be within the limits of any town, whether incorporated or not, such corporation shall locate their road upon such particular road, street, or alley, or public grounds, within such town as the local authorities mentioned in the last section and having charge thereof shall designate; but if such local authorities shall fail or refuse to make such designation within a reasonable time when requested, such corporation may make such appropriation without reference thereto."

The City of Portland had no power or authority under its charter of January 23, 1903, in effect when Ordinance No. 16491 was passed, to amend, modify, or repeal the rights granted under this Act of the Legislative Assembly, and at most could regulate the use of this street, and the exercise of this right, under the police power, provided such regulation did not impair, modify, or repeal the right granted under the statute, and provided that the regulation under the police power was reasonable.

Statutes holding that legislative grants to telephone and telegraph companies, and other public service corporations, under general statutes, cannot be impaired or restricted by ordinances of municipal corporations, are analogous to the case at bar.

Abbott et al. v. City of Duluth, 104 Fed. 833  
 Omaha Electric Light & Power Co. v. City  
 of Omaha, 179 Fed. 455, 459  
 Sunset Telephone & Tel. Co. v. City of Po-  
 mona et al., 172 Fed. 829, 832  
 City of Columbus et al. v. Union Pac. Ry.,  
 137 Fed. 869, 873



- City of Wichita v. Old Colony Trust Co. 132  
 Fed. 641, 645  
 State ex rel Wis. Met. Tel. Co. v. Milwaukee,  
 132 Wis. 615;  
 Same case, 1 L. R. A. 581, notes.  
 State ex rel Wis. Tel. Co. v. City of Sheboy-  
 gan, 111 Wis. 23  
 Wisconsin Tel. Co. v. City of Oshkosh, 62  
 Wis. 32  
 Township of Summit v. N. Y. & N. J. Tel.  
 Co., 57 N. J. Eq. 123  
 Chamberlain v. Iowa Tel. Co., 119 Ia. 619,  
 625  
 New Hope Tel. Co. v. City of Concordia,  
 106 Pac. 35 (Kan.)  
 Missouri R. Tel. Co. v. City of Mitchell, 22  
 S. D. 191  
 Michigan Tel. Co. v. City of Benton Harbor,  
 121 Mich. 512  
 Telephone Company v. City of St. Joseph,  
 121 Mich. 502, 506  
 Village of Jonesville v. Southern Michigan  
 Tel. Co., 155 Mich. 86  
 Village of Carthage v. Central N. Y. Tel.  
 Co., 185 N. Y. 448  
 Northwestern Tel. Exchange v. City of Min-  
 neapolis, 81 Minn. 140  
 Western Union Tel. Co. v. City of Visalia,  
 149 Cal. 744  
 State v. City of Helena, 34 Mont. 67  
 City of Wichita v. Missouri & Kansas Tel.  
 Co., 70 Kan. 441  
 State ex rel Tel. Co. v. Mayor, 30 Mont. 338,  
 341  
 3 Dillon on Municipal Corp. 5th Ed. Secs.  
 1122, 1128, 1161, 1226, 1227, 1228, 1229,  
 1230.

The charter of the City of Portland in effect when Ordinance No. 16491 was passed, being the

Act of the Legislative Assembly of January 23, 1903, did not amend, modify or repeal the state statute contained in Sections 6841 and 6842 Lord's Oregon Laws.

- City of Louisville v. Cumberland Tel. Co.,  
224 U. S. 649
- City of Wichita v. Missouri & Kans. Tel. Co.  
70 Kan. 441
- State v. City of Helena, 34 Mont. 67
- City of Louisville v. Louisville Water Co.,  
105 Ky. 754
- 3 Elliott on Railroads, 2nd Ed. Sec. 1076
- Africa v. Board of Mayor & Aldermen, 70  
Fed. 729
- Mayor etc. of Knoxville v. Africa, 77 Fed.  
501, 507
- Citizens St. Ry. Co. v. City Ry. Co., 64 Fed.  
647
- Southern Bell Tel. Co. v. City of Mobile, 162  
Fed. 523, 528
- Dakota Cent. Tel. Co. v. City of Huron, 165  
Fed. 226, 230
- 1 Dillon on Municipal Corp. 5th Ed. Secs.  
235, 236
- Wright v. Nagel, 101 U. S. 791
- Detroit v. Detroit Citizens Street Ry. Co.,  
184 U. S. 368, 395, 397
- Arcata v. Arcata & M. R. R. Co., 92 Cal.  
639, 645
- Eichels et al. v. Evansville St. Ry. Co., 78  
Ind. 261
- Chicago & R. I. Ry. v. City of Joliet, 79  
Ill. 25
- Hudson Tel. Co. v. Jersey City, 49 N. J. L.  
303
- State v. Noyes, 47 Me. 189
- McQuaid v. Portland & Vanc. Ry. Co., 18  
Or. 237, 248
- Rio Grande RR. Co. v. Brownsville, 45 Tex.  
96

## II.

The legislature of the State of Oregon, by the Act of October 14, 1862, by Sections 24 and 25 thereof, being Sections 6841 and 6842 of Lord's Oregon Laws, in the exercise of its public policy, and in furtherance of the uses of this street for the transfer of persons and property, created the rights claimed by the Oregon Central Railroad Company, and the City of Portland evidenced its assent by the enactment of Ordinance No. 599. Whether the rights thereby created were granted by the state, or directly by the city, such grant, and the assent of the city evidenced by this ordinance, when accepted by the Oregon Central Railroad Company became a perpetual and irrevocable franchise. As a matter of law, the Common Council has no power to repeal, amend, or modify this ordinance. The rights thereby created constituted a franchise or contract which cannot be altered, impaired or repealed, and these rights, when accepted by the grantee, became a vested property right which could be assigned, conveyed, mortgaged, sold, leased, or otherwise disposed of, in the same manner and for the same purposes as any other property of this kind. Nor can the company, its successors or assigns, or lessee, be divested of its rights thereunder, excepting by alienation, forfeiture, or condemnation, after just compensation therefor.

Des Moines City Ry. Co. v. City of Des  
Moines, 151 Fed. 854  
City of Rushville v. Rushville Nat. Gas. Co.  
164 Ind. 162

Same case, 3 Am. & Eng. Ann. Cases, 86,  
note at page 88

Northwestern Tel. Exchange v. City of Min-  
neapolis, 81 Minn. 140

Western Union Tel. Co. v. City of Visalia,  
149 Cal. 744

People v. Cent. Union Tel. Co., 192 Ill. 307,  
311

Chicago Tel. Co. v. Northwestern Tel. Co.,  
199 Ill. 324, 346

3 Dillon on Municipal Corp. 5th Ed. Secs.  
1210, 1222, 1242

Mayor etc. of Knoxville v. Africa, 77 Fed.  
501, 507

Baltimore Tr. & Guarantee Co. v. Mayor,  
etc. of City of Baltimore, 64 Fed. 153;  
reversed in

Baltimore v. Baltimore Tr. & Guarantee Co.,  
166 U. S. 673

In the last named case the court held, under the particular circumstances of that case, that where an ordinance granted the right to locate and operate *two* tracks on a portion of the streets covered by a general ordinance, granting the use of the streets for double tracks for many miles, that the subsequent limitation of *that use to one track* to but a few hundred feet, where peculiar and exceptional conditions existed, and where the danger to be apprehended from the use of electric cars on double tracks in a narrow and busy thoroughfare was very great, and where, *prior to the action of the Council prohibiting the laying of double tracks at this point, the company had not located and laid down both tracks*, the right exercised by the Council

was the exercise of a reasonable *regulation of the use of the street*, in the circumstances.

Citizens St. Ry. v. City Railway Co., 56 Fed. 746, 748

Detroit Citizens St. Ry. Co. v. City of Detroit, 64 Fed. 628

Mercantile Tr. & Deposit Co. v. Collins Park Co., 99 Fed. 812, 816

City Street Ry. Co. v. City Ry. Co., 166 U. S. 557

City of Buffalo v. Chadeayne, 134 N. Y. 163, 165

City of Kansas v. Corrigan, 86 Mo. 67

Springfield R. R. Co. v. City of Springfield, 85 Mo. 674

Railroad Co. v. City of New Orleans, 46 La. Ann. 526

City of Burlington v. Burlington St. Ry. Co., 49 Ia. 144

City of Des Moines v. Chicago, R. I. & P. Ry. Co., 41 Ia. 569

City of Indianapolis v. Consumers Gas. Tr. Co., 140 Ind. 107

Western Paving Supply Co. v. Citizens Street Ry., 128 Ind. 525, 529

Village of London Mills v. White, 208 Ill. 289, 298

Wright v. Milwaukee Electric Ry. & L. Co., 95 Wis. 29

City of New Orleans v. Great Southern Tel. Co., 40 La. Ann. 42

Shreveport Traction Co. v. City of Shreveport, 122 La. 1

Madison v. Alton etc. Trac. Co., 235 Ill. 346, 349

People v. Central Union Tel. Co., 232 Ill. 260

Town of Mason v. Railroad Co., 51 W. Va. 183

Com. Electric Light & Power Co. v. Tacoma,  
17 Wash. 661, 672

Vicksburg v. Vicksburg Water Works Co.,  
202 U. S. 453

Louisville v. Cumberland Tel. Co., 224 U. S.  
649

The power to assign this franchise and property right granted to the Oregon Central Railroad Company arises under Sections 5068, 5070, Bellinger & Cotton's Code, then in effect, under which the legislature authorized the dissolution of the railroad company and the sale of its property. Under subdivision 7, of Section 5056, Lord's Oregon Laws, Southern Pacific Company had authority to acquire by lease the property of the Oregon & California Railroad Company, and, under Sections 6735 and 6736 Lord's Oregon Laws, was granted authority to operate its railroad and to acquire by way of lease, all the rights evidenced by Ordinance No. 599. Under Section 227, Lord's Oregon Laws, this property right was subject to sale on execution, and under the power to mortgage, a foreclosure sale under such mortgage would vest in the purchaser title to the rights evidenced by Ordinance No. 599, and this, too, without words of assignability expressly contained in the ordinance.

Southern Bell Tel. Co. v. City of Mobile,  
162 Fed. 523, 532

C. M. & St. Paul Ry. Co. v. Minn. Cent. Ry.  
Co., 14 Fed. 525

Coast Line R. R. Co. v. City of Savannah, 30  
Fed. 646, 648

Cleveland City Ry. Co. v. City of Cleveland,  
94 Fed. 385, 395



- City of St. Louis v. Western Union Tel. Co.,  
 63 Fed. 68, 70  
 Mercantile Tr. & Deposit Co. v. Collins Park  
 Co. 101 Fed. 347, 350  
 People v. O'Brien, 111 N. Y. 1  
 Columbia Ave. Savings etc. Co., v. City of  
 Dawson, 130 Fed. 152  
 Mercantile Tr. & Deposit Co. v. Columbus  
 Water Works Co., 130 Fed. 180  
 Farmers' Loan & Tr. Co. v. Meridian, 139  
 Fed. 661, 665, 669  
 New Orleans Gas Co. v. Louisiana Light Co.  
 115 U. S. 650, 660  
 New Orleans Water Works Co. v. Rivers,  
 115 U. S. 674  
 Detroit v. Detroit Citizens St. Ry. Co., 184  
 U. S. 368, 395, 397  
 Hot Springs Elect. Light Co. v. Hot Springs,  
 70 Ark. 300  
 Workman v. Southern Pacific Co., 129 Cal.  
 536, 543  
 Chicago Municipal Gas L. Co. v. Town of  
 Lake, 130 Ill. 42, 53, 54  
 Belleville v. Citizens Horse Ry. Co., 152 Ill.  
 171, 185  
 Hovelman v. Kansas City Horse Ry. Co.,  
 79 Mo. 632, 643  
 Cleveland v. Cleveland Elect. Ry. Co., 201  
 U. S. 529  
 Los Angeles v. Los Angeles City Water Co.,  
 177 U. S. 558  
 New Orleans etc. R. R. Co. v. Delamore, 114  
 U. S. 501, 507  
 Chicago v. Sheldon, 9 Wall. 50, 55  
 Harvey v. Aurora & Geneva Ry. Co., 186  
 Ill. 283, 293  
 West Chicago v. City of Chicago, 178 Ill. 339  
 People v. West Division Ry. Co., 118 Ill.  
 113, 118  
 Hudson Tel. Co. v. Jersey City, 49 N. J. L.  
 303

- Belleville v. St. Clair Turnpike Co., 234 Ill. 428  
 Vicksburg Water Works Co. v. Vicksburg, 185 U. S. 65  
 Minneapolis v. Minneapolis St. Ry. Co., 215 U. S. 417  
 Greenwood v. Freight Co., 105 U. S. 13, 20  
 Asheville St. Ry. Co. v. City of Asheville, 109 N. C. 688  
 H. J. & C. Traction Co. v. H. & L. E. Trac. Co., 69 Ohio St. 402, 410  
 Mayor etc. v. Houston Street Ry. Co., 83 Tex. 548

### III.

It was not within the police powers of the City of Portland to enact a valid ordinance containing the terms and provisions of Ordinance No. 16491. Such ordinance was not a reasonable exercise of the police power of the city, or of the state. The Council cannot, under the police power, by mere legislative fiat, declare an act to be a nuisance, or assume it to be a nuisance, and abate a lawful act, without judicial review, or opportunity for judicial review, on questions of fact. The use and operation of steam locomotives is not per se a nuisance, nor an injury to the public; nor can it be shown to be an injury in any sense, to the public. Mere private injury, if any exists, is not the subject of legislation under the police power, or under the power to abate a nuisance.

- 3 Dillon on Municipal Corp. Secs. 1269, 1270  
 3 McQuillan on Municipal Corp. Secs. 953-5  
 C. M. & St. P. Ry. v. Minn. Cent. Ry. Co., 14 Fed. 525

Port of Mobile v. Louisville & N. Ry Co., 84  
Ala. 115-122

Grossman v. City of Oakland, 30 Or. 478

Same case, 36 L. R. A. 593, note.

Belleville v. Turnpike Co., 234 Ill. 428

Ex parte Wygant, 39 Or. 429, 432

2 Elliott on Roads & Streets, Sec. 1054, 3rd  
Ed.

1 Elliott on Roads & Streets, Secs. 549, 550,  
3rd Ed.

#### IV.

The City of Portland has ratified the assignment of this franchise, and the rights of complainant thereunder, and is estopped from claiming that such franchise was not assignable, and that complainant has no rights thereunder. Furthermore, by Section 106 of the Act of January 23, 1903, now in effect, the City of Portland ratified and confirmed Ordinance No. 599, and recognized and ratified its continuance in force and effect, as originally granted.

Port of Mobile v. Louisville & N. Ry. Co., 84  
Ala. 115, 122

Chicago, R. I. & P. Ry. Co. v. City of Joliet,  
79 Ill. 25, 40

Com. Electric L. & P. Co. v. Tacoma, 17  
Wash. 661, 672

Carter v. Meuli, 122 Cal. 367

State v. Water Co., 61 Kan. 547

Louisville v. Cumberland Tel. Co., 224 U. S.  
649

Vicksburg v. Vicksburg Water Works Co.,  
202 U. S. 453

## V.

The franchise evidenced by Ordinance No. 599 was one in perpetuity, and the legislature, under Sections 6841 and 6842, Lord's Oregon Laws, had full power and authority to grant a perpetual franchise.

3 Dillon on Municipal Corp. Secs. 1265-1268

A franchise in perpetuity, when authorized by the legislature, may be granted by a municipality.

Des Moines City Ry. Co. v. City of Des Moines, 151 Fed. 855

Louisville Tr. Co. v. City of Cincinnati, 76 Fed. 296, 315

3 Dillon on Municipal Corp. 5th Ed. Secs. 1266, 1267, 1268

Citizens St. Ry. Co. v. City Ry Co., 64 Fed. 647

City Ry. Co. v. Citizens Ry. Co., 166 U. S. 557, 566

Detroit Citizens St. Ry Co. v. City of Detroit, 64 Fed. 628

Capdevielle v. New Orleans & S. F. R. Co., 110 La. 903

Wyandotte Elect. L. Co. v. City of Wyandotte, 124 Mich. 43

Campbellsville Tel. Co. v. Lebanon L. & L. Tel Co., 118 Ky. 277

Venner v. Chicago City Ry Co., 236 Ill. 349

Snell v. City of Chicago, 133 Ill. 413

Blair v. Chicago, 201 U. S. 400

City of Seattle v. Col. & P. S. R. Co., 6 Wash. 379

City v. Telephone Co., 40 La. Ann. 42

Louisville v. Cumberland Tel. Co., 224 U. S. 649

Village of Phoenix v. Gannon, 108 N. Y. Supp. 255

In re Con. Gas. Co. of New York, 106  
 N. Y. Supp. 407  
 People v. O'Brien, 111 N. Y. 1, 38

## VI.

This railroad line on Fourth Street, from North Front Street, or from connection of Front Street with the yards of the Northern Pacific Terminal Company, is a part of the road designated and required to be built under the Act of Congress of May 4, 1870, and is there pursuant to this Act, and cannot be abandoned by the company, or its successors, even if they desired so to do. The City of Portland cannot deprive the company of the use of this portion of its line for any railway purposes contemplated by the Act of Congress of May 4, 1870, including the use of steam locomotives and freight trains. Such use and operation pursuant to this Act of Congress, is subject only to reasonable regulation under the police power of the state or city, which do not amount to prohibition of the substantial use of such instrumentalities.

Pensacola Tel. Co. v. Western Union Tel.  
 Co., 96 U. S. 1  
 3 Dillon on Municipal Corp. 5th Ed. Secs.  
 1269, 1270

## VII.

Even if it be conceded that the city could, under the police power, prohibit the use of steam locomotives on Fourth Street, it could not, as it attempted to do under Ordinance No. 16491, deprive

the company of its right, under reasonable regulations, to move its freight trains at some time during the twenty-four hours. Such a prohibition is a taking of the property of complainant, under the guise of the exercise of the police power; it is not regulation, it is confiscation.

- State ex rel. Wis. Tel. Co. v. City of Sheboygan, 111 Wis. 23, 36  
 State ex rel. Wis. Tel. Co. v. City of Oshkosh, 62 Wis. 32, 40  
 American Union Tel. Co. v. Harrison, 31 N. J. Eq. 627  
 Township of Summit v. N. Y. & N. J. Tel. Co., 57 N. J. Eq. 123, 127  
 New Hope Tel. Co. v. City of Concordia, 106 Pac. 35 (Kan.)  
 Missouri R. Tel. Co. v. City of Mitchell, 22 S. D. 191  
 Michigan Tel. Co. v. City of Benton Harbor, 121 Mich. 512  
 Telephone Co. v. City of St. Joseph, 121 Mich. 502, 506  
 Village of Jonesville v. Southern Michigan Tel. Co., 155 Mich. 86  
 Village of Carthage v. Cent. N. Y. Tel. Co., 185 N. Y. 448  
 Northwestern Tel. Exchange v. City of Minneapolis, 81 Minn. 140  
 3 Dillon on Municipal Corp. 5th Ed. Secs. 1230, 1269, 1270  
 Asheville St. Ry. Co. v. City of Asheville, 109 N. C. 688  
 Shreveport Traction Co. v. City of Shreveport, 122 La. 1

#### VIII.

If Ordinance No. 16491 be invalid in respect to the prohibition against the movement of freight



traffic, then the entire ordinance is void. It is a fundamental rule that if part of an ordinance is void, another essential and connected part of the same is also void. Where an ordinance or statute is couched in terms so broad as to exceed the limitation of the powers of the Council or legislature to enact the same, the court will not, by construction, limit the statute to the scope which might constitutionally be given it by the Council or legislature, but will hold the ordinance or statute unconstitutional and void.

*State v. Mayor of Hoboken*, 38 N. J. L. 110  
*United States v. Ju Toy*, 198 U. S. 253, 262  
*Illinois Cent. R. Co. v. McKendree*, 203 U. S. 514, 529

## IX.

A court of equity has power to protect private property, and to enjoin a continuing injury to property or business, and where a criminal prosecution is threatened or invoked, to prevent the exercise of civil rights conferred by law, injunction is the proper remedy to prevent injury to the property or business thus menaced.

*City of Cleveland v. Cleveland City Ry. Co.*,  
 194 U. S. 517  
*City of Bessemer v. Bessemer City Water Works Co.*, 152 Ala. 391, 402  
*Millville Gas. L. Co. v. Vineland L. & P. Co.*,  
 72 N. J. Eq. 305  
*Vicksburg Water Works Co. v. Vicksburg*,  
 185 U. S. 65  
*Springfield Ry. Co. v. City of Springfield*,  
 85 Mo. 674

- Georgia R. R. & B. Co. v. City of Atlanta,  
118 Ga. 486
- Railroad Co. v. Town of Triadelphia, 58  
W. Va. 487, 505
- Vicksburg v. Vicksburg Water Works Co.,  
202 U. S. 453
- State v. Railway Co., 135 Iowa, 694, 705
- Govin v. City of Chicago, 132 Fed. 848, 855
- S. R. & T. Co. v. Mayor, etc., 128 N. Y.  
510, 520
- Southern Bell T. & T. Co. v. City of Mobile,  
162 Fed. 523, 562
- Des Moines City Ry. Co. v. City of Des  
Moines, 151 Fed. 854
- Detroit v. Detroit Citizens' St. Ry. Co., 184  
U. S. 368, 381

## X.

Ordinance No. 16491 is void in that

- (a) It impairs a vested property right of the complainant,
- (b) It deprives complainant of its property without due process of law; and
- (c) It denies complainant equal protection of the laws.

Cooley, Const. Lim. pp. 556-575

State ex rel Harris v. Herrmann, 75 Mo.  
353-4

This ordinance is arbitrary, unreasonable and unequal in its operation. The City Council apparently attempted to make this ordinance general in its operation by inserting in sections 1 and 2 thereof the words "*or any other person, firm or corporation.*" But in view of the fact that at the time of the passage of this ordinance complainant was then running and operating steam locomotives

and freight cars over, upon and along Fourth Street between termini theretofore fixed and designated, and pursuant to a vested right acquired under Ordinance No. 599, and in view of the further fact that no "other person, firm or corporation" at said time, or ever, ran or operated steam locomotives and freight cars over, upon or along said street, makes it manifest and clear that this Ordinance No. 16491 was intended to be and was drawn with special reference to and was directly aimed at the rights acquired by and vested in complainant under said Ordinance No. 599. The said Ordinance No. 16491 therefore not only impairs the obligations of a contract and a vested right of complainant thereunder, but it also contravenes the provisions of the Federal Constiution in that it denies to complainant equal protection of the laws. The case at bar is easily distinguishable from the case of *Railroad Company v. Richmond*, 96 U. S. 521, relied on by counsel for the city.

In that case the Railroad Company was granted the right to construct a railroad "*from some point within the corporation of Richmond*, to be approved by the Common Council". No definite point within the city of Richmond was fixed. That was left to the discretion of the Railroad Company, subject only to the approval of the city. The grant, in that case, was satisfied when the road was built within the city for *any* distance, by *any* route or to *any* point. The Railroad, however, in that case, desired

to pass through Broad Street and for the present to terminate the road upon the lots purchased for shops and warehouses, and requested the city of Richmond to approve that location. This the city of Richmond did, with the following reservation:

*"Provided that the corporation of Richmond shall not be considered as hereby parting with any power or chartered privilege not necessary to the railroad company for constructing the said railroad, and connecting the same with the depot of said company within the limits of the city."*

This approval, with said reserved power, was accepted by the Railroad Company. In the language of Chief Justice Waite: "The Company therefore occupied Broad Street upon the same terms and conditions it would if the charter had located the route of the road within the city, but, in terms, *subjected the company to the government of the city in respect to the use of the road when constructed.*"

The facts in the case at bar are entirely different. Here the legislature of the State of Oregon, by the terms of the Act of October 14, 1862 (sections 6841 and 6842 of Lord's Oregon Laws) granted to the Oregon Central Railroad Company the right to locate its railroad "*upon such particular road, street, or alley or public grounds within*" the city of Portland, as the local authorities of said city should designate; and in the event the local

authorities of Portland should fail or refuse to make such designation within a reasonable time, when requested, the said Oregon Central Railroad Company had the right to make such *appropriation* without reference thereto

It will be seen that the City of Portland, under the provisions of this Act of October 14th, 1862, had the right in the first instance to *designate* that *particular* street over which the Oregon Central Railroad Company should locate its railroad—but that the railroad company had the *absolute* right to locate its road over *some* street within the city, whether or not the city made any designation. In the case of the *Railroad Company v. Richmond*, 96 U. S. 521, the grant to the railroad company to build its railroad “from some point within the corporation of Richmond” was conditional. It was subject to the approval of the Common Council of Richmond. Again, in that case the Common Council approved the route proposed by the Railroad Company, with the proviso that such approval should not be considered as “parting with *any power or chartered privilege* not necessary to the railroad company for constructing the said railroad, and connecting the same with the depot of said company within the limits of the city.” In this approval the city of Richmond reserved the right to exercise governmental and legislative powers over the road of the railroad company when constructed. The Railroad Company accepted these terms from the city.

Here the Common Council of the City of Portland, under the authority given it by the Act of October 14th, 1862, designated by said Ordinance No. 599, the "center of Fourth Street from the south boundary line of the City of Portland to the north side of "G" Street, and as much farther north as said Fourth Street may extend or be extended," as the particular place and street where the Oregon Central Railroad Company should locate its railroad. The reserved powers in Ordinance No. 599 are not general legislative powers, as was reserved by the Common Council of the City of Richmond, but the powers reserved by this ordinance are limited to specific purposes and within specific bounds, namely:

- (a) To make or to alter regulations for the conduct of said road within the limits of the city.
- (b) To make or to alter regulations for speed of railway cars and locomotives within said limits.
- (c) To restrict or prohibit the running of locomotives *at such time and in such manner* as they may deem necessary.

Under the canons of statutory construction, where the powers reserved are specifically mentioned, such reserved powers will be deemed exclusive of all others. Certainly the power to restrict or prohibit the running of locomotives at certain hours of the day could not be construed to give the power to prohibit the running of the same absolutely and at all times. The power to restrict or prohibit the



running of locomotives "*at such time and in such manner*" as the city council may deem necessary, is a limitation upon the power of the council to prohibit the running of locomotives *absolutely and at all times*.

If Ordinance No. 599 should be given the construction contended for by counsel for the city, it would be necessary to emasculate it and omit therefrom the words "*at such time and in such manner as they may deem necessary*" and interpolate instead the words "*at any time*" or words of similar import or meaning. Certainly the powers reserved in section 3 of Ordinance No. 599 cannot, either by the language used, or by the wildest flights of imagination, be held to give the City power to prohibit the running of freight cars as is attempted to be done in said Ordinance No. 16491. Furthermore, the council had no authority under Ordinance No. 599, or by any ordinance, to make the reservations which have been made. The only power which the Common Council of the City of Portland had on January 6, 1869, when Ordinance No. 599 was passed, was to designate the streets to be appropriated by the Oregon Central Railroad Company, and if the Council refused to designate the street, the legislature authorized the company to appropriate such street as the company might select. It was a grant direct from the state, and the attempt of the Common Council to reserve legislative power by Ordinance No. 599, is void as being unauthorized,

and as attempting to exercise legislative authority which had been exercised by the legislature under the Act of October 14th, 1862, as evidenced by Sections 6841 and 6842 Lord's Oregon Laws. The most that could be said would be that the ordinance having been passed in this form, and accepted by the Oregon Central Railroad Company, operated as a contract, *but such contract could not confer upon the Common Council legislative power which it did not have.*

## XI.

When the *manner* of enforcing municipal regulations is prescribed by law, such method is exclusive.

Section 5 of Ordinance No. 599 prescribes the manner of enforcing the same, and the remedy of the city for a violation thereof. The method or procedure there prescribed is exclusive. The City Council of Portland has never passed any ordinance declaring a forfeiture of this franchise, even if it could do so, which is doubtful. But instead said Ordinance No. 16491, a penal ordinance, the effect of which is to divest complainant of a property right, was passed.

Our contention is that complainant cannot be divested of its property rights under Ordinance No. 599, except for abuse or usurpation of such rights, or misuser, abandonment, or failure or refusal to comply with the terms thereof, and then

only in an action in the name of the state, or in the name of the state on the relation of the city. The state granted the franchise, and the state only can divest complainant thereof. *The state did not authorize any forfeiture to be declared. The grant by the state was absolute and unconditional.*

State v. Railway Co. 135 Iowa, 694

Alabama R. R. Co. v. State, 155 Ala. 491

Village of Phoenix v. Cannon, 108 N. Y. 255

## XII.

Ordinance No. 16491 is *ex post facto* in that it imposes an additional penalty to that prescribed in Ordinance No. 599.

Meffert v. State Board, 66 Kan. 710

Burgess v. Salmon, 97 U. S. 381

Sheperd v. People, 25 N. Y. 406

Calder v. Bull, 3 Dall. 386

Smith v. Cockrill, 6 Wall. 756

## XIII.

Ordinance No. 16491 is void in that it alters the existing remedy under Ordinance No. 599 to such an extent as to materially affect the rights of complainant vested under said Ordinance No. 599. The existing remedy under Ordinance No. 599 for the enforcement of the contract thereunder, is a part of the contract and such remedy cannot be so altered or changed as to impair the contract.

White v. Hart, 13 Wall. 646

Gunn v. Barry, 15 Wall. 610

Bronson v. Kinzie, 1 How. 311

Barnitz v. Beverly, 163 U. S. 118

Pen. L. & C. Works v. Union Oil Co., 100 Wis. 488

Where the charter of a municipal corporation prescribes the *manner* in which its ordinances are to be enforced, the manner so prescribed is exclusive, and they cannot be enforced in any other *manner*.

Cooley, Const. Lim. pp. 265-6, 270, 278, 473  
Dillon on Mun. Corp. 3rd Ed. Secs. 336, 339, 410

McQuillan on Mun. Ordinances, Sec. 169

Douglass v. Mayor of Placerville, 18 Cal. 644

Town of Petersburg v. Petzker, 21 Ill. 204

Belleville v. Citizens Horse Ry. Co. 152 Ill. 171

Commonwealth v. Wilkins, 121 Mass. 356

Weeks v. Forman, City Treas., 16 N. J. L. 237

White v. Tallman, 26 N. J. L. 67

State v. Ziegler, 32 N. J. L. 262

Lelan v. Commissioners, 42 N. J. L. 375

Staates v. Borough of Wash., 44 N. J. L. 605

Landis v. Vineland, 54 N. J. L. 75

Hart v. Mayor, p. 588, 589, 9 Wend.

Coonley v. City of Albany, 132 N. Y. 145

Railway v. Asheville, 109 N. C. 690

Mays v. Cincinnati, 1 Ohio St. 268

City of Corvallis v. Carlile, 10 Or. 139

City of Portland v. Schmidt, 13 Or. 17

Walsh v. City of Union, 13 Or. 589

Beers v. Dalles City, 16 Or. 334

Barter v. Comm. 3 P. W. (Penn.) 253

State ex rel Heise v. Columbia, 6 Rich. (S. C.) 404

Blanchard v. City of Bristol, 100 Va. 469

Wheeling etc. R. R. Co. v. Triadelphia, 4 L. R. A. n. s. 321

Where the charter of a municipal corporation prescribes that *certain* penalties may be imposed for a violation of any ordinance, such penalties are ex-

clusive, and an ordinance prescribing a different or greater penalty is void.

Angell & Ames on Corp. Sec. 360

Cooley, Const. Lim. p. 473

Dillons Mun. Corp. Secs. 336, 337, 339, 410

McQuillan on Ordinances, Sec. 169

Ex parte Lange, 85 U. S. 163

Town of Petersburg v. Metzker, 21 Ill. 206

Com. v. Wilkins, 121 Mass. 356

Leland v. Commissioners, 42 N. J. L. 375

Staates v. Borough of Washington, 44 N. J. L. 605

Landis v. Vineland, 54 N. J. L. 75

Mayor v. Ordeman, 12 John. 122

State ex rel Heis v. Columbia, 6 Rich. (S. C.) 404

Section 73 of Article IV of the Charter of the City of Portland, approved January 23, 1903, and in force at the time of the passage of this Ordinance No. 16491, provides:

"The council has power and authority, subject to the provisions, limitations, and restrictions in this charter contained,—

"To provide for the punishment of a violation of any ordinance of the city by fine or imprisonment, *not exceeding \$500 fine or six months' imprisonment, or both, or by forfeiture as penalty.*"

Ordinance No. 16491 makes the following provision for the punishment of a violation thereof, to-wit:

"Sec. 2. Any violation of the provisions of this ordinance by the owners, officers, agents, or employes, of said Oregon Central Railroad Company, or its successors, assigns, or lessees, or any other person, firm or corporation, by so

running or operating steam locomotives or freight cars (other than those excepted in section 1 hereof) or attempting to run or operate the same on said Fourth Street after the time mentioned in section 1 of this ordinance, shall be punishable *by a fine of not less than \$250.00, nor more than \$500.00, or by imprisonment for not more than six months, or by both such fine and imprisonment, and each day's running or operating, or attempting to run or operate such steam locomotives or freight cars, shall constitute a separate offense, and such violation shall be deemed a forfeiture of any and all rights and privileges claimed by said Oregon Central Railroad Company with respect to the operation of any railway on said street.*"

It will be observed that the Charter of the City of Portland prescribes the manner in which ordinances are to be enforced. That is to say, it provides for a punishment for a violation of any ordinance by a fine of *not exceeding \$500 or six months imprisonment, or both, or by forfeiture as penalty*; whereas Ordinance No. 16491 imposes a penalty for a violation thereof and punishes a violation thereof by a fine of *not less than \$250 nor more than \$500, or by imprisonment for not more than six months, or by both such fine and imprisonment*; and also provides that each day's running or operating or attempting to run or operate steam locomotives or freight cars should constitute a separate offense; *and also imposes the further penalty of a forfeiture of any and all rights and privileges claimed by the said Oregon Central Railroad Company in respect to the operation of said railway on said street.*



Q. When was the building at Couch and Fourth Streets known as the Overland Hotel built?

A. That was built more than twenty-two years ago.

Q. An old building?

A. Yes sir.

Q. When was the building occupied by the Pacific Paper Company at Fourth and Ankeny built?

A. 1909.

Q. What story—two story building?

A. That is—

Q. Seven?

A. Seven stories.

Q. When was the Blake-McFall construction commenced?

A. In April of this year. It is about eighty per cent completed and is about six stories high.

Q. When was the building occupied by Marshall-Wells Hardware Company built?

A. About five or six years ago.

Q. When was the Weinhardt Building built?

A. That was built five years ago.

Q. When was the Lewis Building commenced?

A. That is under construction and just about finished.

Q. What is that building?

A. That is a nine-story—nine story concrete.

Q. What is it to be?

A. Office building.

Q. And its estimated cost?

694 A. About four hundred and fifty thousand.

Q. What did the Board of Trade Building cost, estimated?

A. I am not familiar with that, but about three hundred and fifty thousand.

Q. When was the Chamber of Commerce Building built, Fourth and Stark, between Third and Fourth?

A. About 1890 I think.

Q. Who owns that now?

A. Why, a Seattle Dock Company at Seattle.

Q. When did they buy it?

A. They bought it about two years ago, from Ladd & Tilton's Bank and the New York Life Insurance Co.

Q. What did they pay for it?

A. I understand six hundred thousand.

Q. What was paid for the 50 x 100 owned by Rufus Mallory between Third and Fourth, facing on Stark?

A. I am not familiar.

Q. Was that the Stearns property?

A. Yes.

Q. Hundred and twenty-five thousand.

A. Something like that, I am not sure.

Q. What is it worth now.

A. About two hundred and fifty thousand.

Q. Isn't it true that it is now under lease to a builder who is paying a ground rent under a twenty-five years' lease of about fifteen hundred dollars a month?

A. Yes sir.

Q. And to build a ten or eleven story building and leave it on the ground?

A. The lease was supposed to have been sold two weeks ago to Mr. Bushong, but he has let it go—has changed his mind.

695 Q. Is the lease in effect or abandoned?

A. No, the lease is in effect—a man by the name of Stickney and some other man got the lease from Mr. Mallory, and trying to turn it over.

Q. What is the term?

A. I understand fifteen hundred per month for twenty-five years and about three years have run.

Q. And they have paid rent during that time?

A. Yes sir.

Q. And that is net to the owner?

A. Yes sir.

Q. Fourth and Washington, occupied by Woodard, Clarke & Co. They are the leading retail druggists of the city?

A. Yes sir.

Q. The largest retail drug firm of the northwest?

A. Yes sir.

Q. They have been there how long?

A. About twelve years or more.

Q. What would you say as to Fourth and Washington being one of, if not the best, retail corner in the entire city of Portland at the present time?

A. Fourth and Washington and Fourth and Morrison are about the best locations in the city at this present time.

Q. There is some progress being made toward making of the four corners at Fifth and Washington and Sixth and Washington, or on Sixth Street, Morrison and Alder and Washington, as something equal to Fourth and Washington and Fourth and Morrison in the retail character, value and capacity.

A. Yes.

Q. The growth of the city is West?

A. Yes.

Q. Retail values growing west?

A. Yea.

Recess taken to 2 P. M. Friday, December 3, 1909.

696 J. N. WHEELER, a witness called on behalf of the defense, being first duly sworn, testified as follows.

Direct examination.

Questions by Mr. BENBOW:

— Mr. Wheeler, where do you reside?

A. Street and number? I live on East Ninth—1335 East Ninth Street North.

Q. How long have you lived in the city of Portland?

A. I came to Portland May, 1876.

Q. What was your business in the early days when you were in the city?

A. I was in the employ of the railroad company here for a part of '79 almost continuously until '94—the summer or '94.

Q. You have noted the size and construction of their engines at that date?

A. To a certain extent, yes sir.

Q. And you operated their engines in the city?

A. Yes sir.

Q. Ever operate an engine up and down Fourth Street?

A. Never did. I never ran an engine up Fourth.

Q. But you have been up and down Fourth Street?

A. Yes sir.

Q. What was the weight of their locomotives at that time?

A. They would range I would judge, from thirty-five to forty-five tons, something like that.

Q. You are familiar with the locomotives now in operation over Fourth Street?

A. Well, I know there is some larger locomotives.

Q. About how many tons are they now?

697 A. Well, this is only an estimate. I have never seen any of them weighed, but I should think sixty-five to seventy tons—the engines running on Fourth Street now.

Q. You are familiar with the action of an engine on a steep grade?

A. Yes sir, I am.

Q. Describe to the Court please, what is the effect as to vibration, etc. of climbing a grade by a steam engine.

A. Well, the larger the locomotive and the greater the grade the heavier they work, the more steam they consume and the greater the noise of the exhaust which causes vibration. A very small engine does not use as much steam as a larger. The larger the engine the greater the noise of the exhaust and the vibration caused by the displacing of the air from the exhaust.

Q. The vibration is greater in proportion to the weight of the engine?

A. Yes sir.

No Cross Examination.

Witness excused.

698 E. J. WENTZ, a witness called on behalf of the defense, being first duly sworn, testified as follows:

Direct examination.

Questions by Mr. KAVANAUGH:

— What is your name and business?

A. E. J. Wentz. Manager of Silverfield Company Fourth and Morrison.

Q. How long have you been manager for the Silverfield Co.?

A. Well, this last time I have been with them—only been with them two months—four or five years ago I was with them two years.

Q. Where is Silverfield Company's place located?

A. Corner Fourth and Morrison.

Q. Which corner?

A. Northwest corner.

Q. And what is the character of the business?

A. Ladies' cloaks and suits and furs, millinery, etc.

Q. How much space is occupied by the business?

A. 60 feet by 74 feet I should judge—60 feet by 74.

Q. How many floors?

A. Three floors.

Q. The whole building there?

A. The whole building, yes, the whole part of that building.

Mr. FENTON: What?

A. The part of that building on the east side of that building.

Mr. KAVANAUGH: But clear from the top to the bottom?

A. Clear from the top to the bottom, yes sir, basement also.

Q. The Fourth street line runs on Fourth Street adjoining your building?

A. Yes sir.

Q. What effect has that on your business?

699 A. Well, there is different ways its effect on us. The meanest and the worst way is the steam, dust, soot, and smoke enter into our windows when our windows are open in the summer; and when we have to have them open to get fresh air for our salesladies, soot, dust and smoke and cinders come in the window and spoil the merchandise—the carpets on the floor, expensive carpets—then the merchandise cannot be kept clean.

Q. Do you carry an expensive line of wear?

A. Yes sir.

Q. Suits and furs?

A. Especially in cloaks, suits—furs also. Of course we have furs running all the way from five to a thousand dollars per garment.

Q. What effect has the noise?

A. The noise on the first floor—if anyone on the first floor is talking to a customer, just about the time this train comes along, he cannot understand a word—simply have to stop doing business until the trains have passed.

Q. What effect does it have upon the use of the telephone?

A. Cannot hear a word—simply not one word of telephoning.

Q. Has it any effect on your electric or gas bill?

A. Very true it has. Every time a train goes by of course the lamps shake. We simply stop business entirely until the train is by—of all nature.

Q. Well, how often do they go by?

A. Oh, I should judge—at the present time of course it is more than it has been—I should judge at the present time we get about six trains during business hours.

Q. About six trains?

A. During business hours.

700 Q. When do your business hours begin?

A. Eight o'clock in the morning until six in the evening, Saturday until nine thirty.

Q. Do the bells ring too?

A. Oh, yes, very annoying the noise.

Q. Escaping steam is one of the large matters?

A. Yes, the escaping of steam.

Mr. FENTON: A little bit leading.

Mr. KAVANAUGH: What have you to say concerning the vibration, the shaking?

A. We have for instance—if our window—the trimmer goes into our window and puts a good window as the other windows are in the other part of the city, it would be all to pieces the next morning.

Q. Shaken out?

A. It would be shaken out.

Mr. FENTON: What?

A. The fixtures and different wares we put in the window. Of course if the window trimmer—you will understand if we took three umbrellas and stood in a stationary window, we just take the umbrellas and set together. We don't have to tie them up and in our window you have to tie them down so when the train comes along they won't be disturbed.

Q. How about the draping of dress goods, etc., in windows?

A. We have no dress goods. The only thing we have is—

Q. All made up?

A. Yes sir.

Q. Your forms, do you—

A. Quite often we have to pin them up—well, most of the time. We do pin everything up because we know they will fall down if we don't pin them.

Q. There are some other car lines passing your place—  
701 some electric car lines?

A. Yes sir, on Morrison Street.

Q. Do they cause as much vibration as the other?

A. Oh, no.

Q. They cause you no apparent damage by shaking?

A. Oh, no.

Q. Or noise?

A. No.

Cross-examination.

Questions by Mr. FENTON:

— Mr. Wentz, I want to ask you a few questions. You have been with Silverfields—what is the name of the company?

A. The Silverfield Company.

Q. That is owned by Mrs. Silverfield?

A. By Mr. Silverfield and Company.

Q. But Mrs. Silverfield was in charge as manager for a long time, wasn't she?

A. Well, she is there every afternoon.

Q. Yes, she has been foreman to a certain extent.

A. To a certain extent, yes.

Q. She handles furs?

A. No, Mr. Silverfield himself handles the fur department. Mrs. Silverfield has charge of the millinery.

Q. Well, the company then handles furs extensively?

A. Yes sir.

Q. Consisting of ladies' furs, neck dresses and muffs and collars—

A. Coats.

Q. —coats and things of that kind.

A. Jackets, and so on, etc.

Q. You also handle millinery?

A. Yes sir.

702 Q. Silk waists and things of that kind?

A. Yes, sir.

Q. Are your goods kept on shelves or in—how are they kept?

A. The furs, the most expensive furs we handle are kept under cover, but the cheaper furs and long furs which we cannot put under cover are hung on circular racks, as you have seen them in stores.

Q. And your furs, your cheaper furs, are exhibited in show windows on the Morrison Street side?

A. Yes, quite often.

Q. Very large stock of furs in the big window on Morrison street?

A. Well, we change them once in a while. I use the Fourth street window once in a while and use the Morrison street. I change the windows.

Q. These furs hang on forms, don't they?

A. Yes, sir—well, stands.

Q. Stands. Those furs don't fall down, do they, with the jar of the trains?

A. Not on Morrison street.

Q. I know. Ever have any furs fall down by reason of the vibration of the train on the Fourth street side?

A. Fourth street side, yes, sir.

Q. The frame turn over?

A. Quite often we lay or put on the floor in the windows small pieces of fur—cover the whole floor.

Q. I know—just lay it down.

A. Just lay it down, yes, sir. We take one of our stands and set these stands in there. Now, if this stand is not perfectly level—perfectly level, the train comes along and the whole tips over.

703 Q. In other words, you fill the window with furs right on the hard floor.

A. Small pieces.



Q. The hard floor of the show window. Then you put one of these little, frail stands that carry a small fur?

A. Yes, sir.

Q. With a six inch bottom, round?

A. Yes, sir.

Q. Setting up there about three feet high?

A. Yes, sir.

Q. You put a fur on a rack of that character and it will tip over, or lose its balance, by the jar?

A. Yes, sir.

Q. Now, that form stands on about a six inch circular pedestal, about three and a half to four feet high—has cross-arms?

A. Cross-arms.

Q. If the fur is not balanced exactly on the cross-arm it will fall over of its own weight?

A. It would not fall over of its own weight, if nobody touched it or jarred it.

Q. But the slightest movement would upset it, if not exactly balanced to the ounce on the pedestal?

A. It would, yes, sir.

Q. Now, then, the windows which you say you cannot keep your draping on—what draping do you have on Fourth street?

A. I didn't mean draperies at all.

Q. What is it?

A. It is, for instance, little neck pieces—fine neck pieces which we carry—cost all the way from twenty-five cents to five or  
704 six dollars.

Q. That is lace pieces.

A. Yes. If you take one of these little lace pieces——

Q. Hand made?

A. Hand made lace, Swiss goods. Take one little lace collar, set it on a little light glass stand, and I have a great many broken—one glass stand was broken this morning.

Q. You don't know what caused it?

A. The first thing the boy said was the train.

Q. Of course, it is always broken by the train. He may have broken it himself.

A. If we put a little lace collar on this glass, which naturally is slippery——

Q. Very frail.

A. Very frail and slippery.

Q. Easily upset.

A. The train goes by and I go back in the window and I find the collar on the floor.

Q. The lace collars cannot be pinned to the glass stand?

A. Impossible.

Q. Just lay it on?

A. Just lay it on.

Q. And the vibration of the train comes along by that building and it falls off and lays on the platform.

A. On the floor.

Q. The hardwood floor in the window for show purposes?

A. Yes, sir.

Q. Not where people travel?

A. No, no.

Q. For the purpose of exhibiting the fine wares you have for sale?

A. The floor is not there for that purpose. It is the place to walk on. We use our own shoes.

Q. I know. You go in there to dress the window, but not used for the ordinary traffic about the store?

A. No.

Q. You don't go in with slippers on?

A. No, but if one of our eight or nine or ten dollar collars gets on the floor and lays there for a while it gets dusty and we have to sell it as soiled wear.

Q. Have you any collars that are worth eight or nine dollars?

A. I don't want to say at the present time, but we have had—would go some fifteen dollars.

Q. You have nothing above five dollars, have you?

A. I think so, yes.

Q. You have only been there on that corner two months?

A. Last two months.

Q. When was that leased by the Silverfield Company?

A. It was leased eight years ago.

Q. And then the Silverfield Company remodeled the whole thing—put in a glass front?

A. Yes, a short time ago.

Q. Took out the brick wall on Morrison street side and on the Fourth street side and put unsubstantial columns and put glass all around?

A. Put in just as good, substantial columns as can be put in any front.

Q. What kind of columns?

A. Iron columns.

Q. Two on the Morrison street side and two on the Fourth street?

706 A. And one on the corner.

Q. How much have you on Fourth street?

A. Fifty—about forty-nine feet.

Q. How much have you on Morrison?

A. About sixty-two feet.

Q. And you have one column on the Fourth street side, besides the corner?

A. And the supports for the doors.

Q. What supports are they?

A. On the corner that are 6x6.

Q. Wood or steel?

A. Wood.

Q. And what have you now to support that east wall of the three-story building where the glass is for the first floor?

A. Three columns.

Q. Column on the corner and a column in the middle?

A. And one on the end.

Q. What?

A. The brick wall, or end.

Q. So you have one column between the corner and the end where you connect with the brick wall on Fourth street?

A. Yes. There is the original old column there, if I remember right.

Q. They were taken out—were wood, were they not?

A. No, there is one or two, I think, brick columns in there.

Q. Then on the Morrison street side you have one column on the corner and then you have one column, and then——

A. On each side of the entrance.

Q. Each side of the door, and those are wooded columns?

A. No, those leading up to the balcony are iron columns, six inch columns.

Q. How many?

707 A. Two for the entrance and the wall on each side.

Q. The wall above is brick?

A. Brick.

Q. That was a very frail brick structure when built, was it not?

A. No, we think it all right.

Q. Who owns that building?

A. Rosenblatt.

Q. And it was rented about seven or eight years ago by Silverfield and then remodeled at his own expense about a year ago?

A. About two months ago. Well, we just got through.

Q. Just got finished up?

A. Just got finished up.

Q. Now, the railroad was there when Silverfield came there, wasn't it?

A. Oh, yes.

Q. Where was their first place before?

A. Somewhere on First street.

Q. First and what?

A. First and Salmon; somewhere up in there.

Q. And when they enlarged their business and wanted a more popular crossing they moved to Fourth and Morrison?

A. Yes, sir.

Q. And spent a good deal of money to remodel and get plate glass in?

A. Yes.

Q. And have been there ever since. Now, you say soot from these engines?

A. Soot, smoke and dust.

Q. It is oil burners, aren't they—these engines?

A. They throw it just the same—some dust, soot and smoke.

Q. Well, the dust don't come from the engine. It comes from the street.

708

A. That is true. The engines cause the dust to fly.

Q. Stirring it up?

A. Stirring it up.

Q. But no smoke or smut or cinders come from the oil burners.

A. I beg your pardon—smoke.

Q. There is smoke, but that is all?

A. Smoke—yes, there is smoke.

Q. Now, that smoke comes through your windows on the Fourth street side?

A. Fourth street side, yes, sir.

Q. And it goes through because you have to have them open?

A. Yes.

Q. And such goods as are exposed and not in the pasteboard boxes as ordinarily kept, of course get some of the effect of this smoke or dust, but aren't most of your goods kept in pasteboard boxes, under cover, except the cheaper lines?

A. Allow me to tell you, Judge. The question asked is where do you keep at the present time our furs and so on and so forth. I said keep the best ones under cover. We have gone to expense of between six and seven thousand dollars to fix up our store in the last three or four months on account of this smoke and dust, to keep these goods.

Q. Do you mean to say, Mr. Wentz, that you would not have gone to the expense of six or seven thousand dollars for cabinets and fixtures but for the carline on Fourth Street?

A. I don't think so.

Q. Don't you know that not a modern house in your line  
709 anywhere in any city but what keeps its most valuable goods under cover?

Q. Well, in our business we like to sell our goods, and the more we show the better the sales.

Q. I understand, therefore you spend the money on show windows.

A. I want my goods on exhibition—display—I want them open and shown.

Q. Don't you know there is not a first class house in your line in any modern city that does not have cabinets to keep the majority under cover, and leaving out a few samples for the show windows?

A. Naturally. Not all of them. We cannot keep all in cabinets.

Q. I know; you keep your show windows, and have a cheaper lot on the shelves in boxes, such as linen waists of cheap character; but your silk waists, and all your valuable goods are kept under cover except those used in your show windows?

A. Oh, yes, naturally.

Q. And you would do that whether on Fourth street or Fifth or Sixth?

A. I don't think we would, but if on Fifth street we would not have to be so careful with our silk and that stuff as we do on Fourth street. I don't believe we would.

Q. But all houses in your line do so.

A. Oh, they take care of their merchandise.

Q. Do you know what rental Silverfield paid for that property there—those three floors?

A. No.

Q. It is very high, isn't it?

710 Mr. KAVANAUGH: He said he didn't know.

Mr. FENTON:

Q. Or do you know?

A. It is not very high—no—you see, we had the store when—well, I don't know this last lease that was made.

Q. Mr. Silverfield and Mrs. Silverfield are both in town?

A. He is not.

Q. Mrs. Silverfield is?

A. Yes.

Q. She would know?

A. Yes, she would know.

Witness excused.

711 A. S. BRASSFIELD, A witness called in behalf of the defendant, being first duly sworn, testified as follows:

Direct examination.

Questions by Mr. KAVANAUGH:

— Mr. Brassfield, what are your initials?

A. A. S.

Q. What is your business?

A. Book-keeper for A. B. Steinbach.

Q. How long have you been with that firm?

A. 21 years.

Q. How long has that firm been in business on Fourth and Morrison?

A. Eleven years, a little over.

Q. On Fourth street the West Side railroad line runs along the street on which this building adjoins for one hundred feet, doesn't it?

A. Yes, sir.

Q. And the Portland Railway, Light and Power Company's lines run along Morrison street in front of the building?

A. Yes.

Q. Mr. Brassfield, I wish you would explain to the Court what effect the running of steam locomotives on Fourth Street has upon your business. First, it is a general clothing business?

A. Yes.

Q. State to the Court what effect it has upon the conduct of your business there.

A. Well, one annoyance we have is that we have a cement walk, that is lighted with what we call the Jackson light system.  
712 This light is from prisms set in the walk to reflect light in the basement. We are at an expense all the time to keep the cement around the prisms, to keep them from leaking. We have never been without a leak on the Fourth street side. We don't have any trouble with the Morrison street side.

Q. What causes that?

A. We think it is the vibration of the trains going by.

Q. Under similar conditions on Morrison street that doesn't occur?

A. We have never spent any money there.

Q. What other effect has it?

A. Well, another effect is the annoyance of transacting business. A customer being waited on by a salesman invariably has to stop conversation with the salesman until the train passes. And any one when using the phone has to stop until the train goes by, and also we feel it probably has some effect in causing us an expense in the way of replacing our electric light globes along in the Fourth street windows. Tungstens we have quit using in there because of the expensive globes, and they are very delicate. They went bad on us so quick we went back to the old style lamp. We feel that has been due to the vibration of the train.

Q. What effect has the smoke or dust?

A. Well, in the summer time, when we have our transoms open and a pretty heavy train going up with a couple of engines in front, and sometimes one behind when loaded and the atmospheric conditions are right, it makes some smoke come down and we get a little.

713 We never notice it so much in the store—once in a while some comes in, but our windows are hard to keep clean on that side. Kind of a greasy effect—I suppose the oil burners.

Q. Business all on the lower floor, is it?

A. Lower floor and basement.

Q. Very extensive business?

A. Well, we use our basement for salesmen's rooms.

Q. I say, you have a large business there?

A. Yes, sir.

Q. What is the effect on your business in these particulars from the operation of the electric cars on Morrison street, as compared with the steam locomotives on Fourth street?

A. Well, I don't notice any vibration from the Morrison street side.

Q. Have any trouble with your prisms along on that side?

A. No, never spent a dollar over there for fixing them. Continually spending, in fact, never without a leak some place on our Fourth street side.

Q. How far is the outer rail, the southern rail of the electric road, from your building, as compared with the west rail of the other road, the steam road—a good deal closer, isn't it?

A. No, there is a double track on Morrison Street; I would judge that the rail nearest our store on Morrison street would be a little nearer the store than the west rail on the Southern Pacific though I have never measured it.

Q. Morrison street is a sixty foot Street, isn't it?

A. I think so.

Q. And Fourth street is eighty foot?

A. That I don't know; I am not certain about it.



## 714 Cross-examination.

## Questions by Mr. FENTON:

— Mr. Brassfield, how long has the firm of A. B. Steinbach & Company, by whom you are employed, been doing business at Fourth and Morrison?

A. Why, we moved up there, Judge, I think it was in 1898.

Q. And you formerly did business on First and Morrison?

A. First and Morrison.

Q. On First and Morrison. How much floor space did you have there?

A. We had 50 by 100.

Q. At Fourth and Morrison you have 100 feet square?

A. One hundred feet square, except a little space Heitkemper takes on the Morrison street side.

Q. How much space does Heitkemper take for his jewelry store?

A. 20 by 60; maybe 21 by 60.

Q. And you have the balance of the quarter block?

A. First floor and basement.

Q. Was the store constructed for you?

A. Yes sir.

Q. Russell Building?

A. Yes sir.

Q. Who owns it?

A. Mrs. S. D. Smith built it.

Q. Isn't it called—what is it called?

A. Russell Building.

Q. Russell Building. Two or three stories?

A. Two story building.

Q. What is the depth of your basement?

A. Nine feet in the clear.

Q. Is it mill construction or steel?

715 A. Steel pillars.

Q. How do you mean steel?

A. Ask the question again, please.

Q. Is it a building built with brick walls, or was it built with a steel frame?

A. Brick walls, I guess you would call it.

Q. Mill construction then.

A. On the first floor, you know, is no brick; all supported by steel pillars, the first floor. The next is brick.

Q. Isn't it a building with iron columns running up to the second floor, so you may have a glass front?

A. Yes, iron and glass.

Q. You have a plate glass front on Morrison street of one hundred feet—less on Fourth street?

A. Yes, sir.

Q. And you use that show window some?

A. Yes, sir.

Q. Then you have outside of the building, in the corner another show window?

A. Yes, sir; we call it a vestibule window.

Q. That tiled?

A. Runway.

Q. Runway into the corner and across the corner, for the convenience of the public and your patrons, and also to enable you to use that for a handsome show window?

A. Yes.

Q. And that is right on the corner of Fourth and Morrison, and there you have fine hats and goods you want to show as samples?

A. Yes, I use that as a display window.

Q. Yes, and then the North window, on Morrison street, a distance of about 88 feet, 78 feet, is also a show window, with oak  
716 floor, and a curved background to shut off the store from the goods on exhibit?

A. Well, the windows are encased inside; not oval, but square top.

Q. Square; I thought it was oval. That has plate glass on that side?

A. Yes, sir.

Q. All specially built for A. B. Steinbach & Company for the purpose of carrying on the business of a clothing dealer—high class clothing dealer is the business you follow?

A. Yes, sir.

Q. Now, isn't it true, Mr. Brassfield, that these prisms that you speak of are simply squares of glass about two and a half by two and a half inches in area and about three-quarters inches in thickness that are let into cast iron frames and are cemented or fastened in there as they are laid in the walk?

A. Well, you haven't got the shape; it is round.

Q. Are yours round?

A. Round, and has a projection on the inside about that long (illustrates); flat on one side to reflect the light—throw the light in the basement.

Q. Ordinary sidewalk prism light?

A. Yes.

Q. Some square—lots are square. Those that were put in five or six or seven years ago are round or oblong.

A. Round.

Q. Now, isn't it a fact, and haven't you observed it to be a fact, that these prism lights that were out in the sidewalk to light the basements, that were put in and installed more than eight  
717 years ago are much more unsatisfactory than the ones that are now being put in that are square and laid in cement and covered all over and buried in cement, and afterwards cleaned on top and cleared so you can see them?

A. I cannot—I have never been in a basement where the last kind you speak of are being in use. Our own basement is the only one I know.

Q. Do you know that in front of Meier & Frank's, over on the Morrison street side, or on the Fifth street side, I am not certain which, the old style prism lights are used, and on the Sixth street side you have the square prism light? You have noticed those?

A. From the outside, yes, sir.

Q. Haven't you noticed in going along those sidewalks with the old style prism lights there would be half a dozen places where there were holes in the walk—where the light was entirely out, frequently, on those streets?

A. Yes.

Q. Have you ever seen one of those prism lights that were square and buried in the cement when they are laid that were out, except knocked out with a hammer, something of that kind?

A. I don't know but it is just as easy to knock them out as round ones.

Q. Not near; They knock out by walking over.

A. Newer thing.

Q. As a matter of fact, those lights you have there in that sidewalk are lights of the old style?

A. Yes, but they leaked immediately after being put in, and have been leaking ever since.

718 Q. Never were effective.

A. The best thing in the market at that time, the Jackson light.

Q. But now aren't being put in anywhere in the city?

A. They may be.

Q. Now, these Tungsten lights—they are very delicate lights—the wires. Did you ever notice that those lights will not jar out or anything affect them while they are burning, but that they will break when they are cold?

A. Never noticed that.

Q. Never noticed that. Now, don't you know, as a matter of fact, that the General Electric Company are supplying an improved light to substitute for the Tungsten burner for that reason, that this is so delicate that the slightest vibration when it is cold will break the light and the next morning when the current is turned on it is gone. Don't you know that is a fact?

A. No, I don't.

Q. You have discontinued the use of the Tungsten burner, have you?

A. Yes, we thought it too expensive on that side.

Q. They are of recent introduction—rather recent?

A. We only tried them, some little while *while* ago—they went too quick for us.

Q. Mr. Brassfield, do you know what rental Mr. Steinbach pays for that 100 feet square?

A. Yes.

Q. What is it?

— \$15,000 a year.

Q. \$1,250 a month.

A. The entire building.

Q. He gets the upstairs too?

A. Yes, sir.

719 Q. And he leases the upstairs and gets rent? How many floors?

A. One.

Q. How many offices?

Mr. KAVANAUGH: If the Court please, what has this to do?

Mr. FENTON: I want to show the valuable corner next the railroad.

Mr. KAVANAUGH: The location makes it valuable.

A. I think there is fifteen or sixteen rooms, I cannot just tell.

Mr. FENTON:

Q. Used as offices?

A. Yes, sir.

Q. When you left First and came up to Fourth street you came voluntarily?

A. Yes, sir.

Q. You knew the railroad was there?

A. But we didn't know—we came to Fourth street because of getting a location on Morrison street.

Q. You were on Morrison street when on First?

A. Yes. We knew the railroad was there, ran there all the while.

Q. And you came, notwithstanding its burdens and benefits?

A. Yes.

Redirect examination:

Q. Now, the prism lights, the basement lights, on Morrison street, have stood the wear better than those on Fourth street.

A. Yes.

Q. And how about the Tungsten light on Morrison Street?

A. They never gave us as much trouble.

Witness excused.

720 JOHN B. CLELAND, a witness called on behalf of the defense, being first duly sworn, testified as follows:

Direct examination.

Questions by Mr. KAVANAUGH:

— Judge, you are on the Circuit Bench, are you?

A. Yes.

Q. How long have you been on the bench?

A. 8th of January, 1898.

Q. And constantly engaged in hearings in the County Court house during Court time?

A. Considerable portion of the time, yes.

Q. Have you held court in all of the different Court rooms in the Court House there?

A. Yes.

Q. Four different Court rooms upstairs?

A. Yes.

Q. Where do you hold Court now, or what is your Court room?

A. No. 3, the room that is usually known as Department 2 on the East side of the building.

Q. The building has been somewhat narrowed on the East side on account of the construction of the new Court House?

A. Yes, a portion of the chambers of the judge and a portion of the Court room cut off.

Q. What is the effect, Judge, during the hearing of cases of the passage of locomotives and trains on the Fourth street railroad?

A. What is the effect upon—

Q. Upon the hearings in the Court room.

A. Must be suspended until the trains have passed.

721 Q. Is that true of both passenger and freight trains?

A. Yes.

Q. How many trains generally pass during the day, if you remember?

A. I don't remember the exact number.

Q. Two or three in the morning and two or three in the afternoon?

A. I should say not less than two in the morning and probably three in the afternoon, but there is one train that seems to be irregular, and some switching.

Q. Do single engines run up and down occasionally?

A. Yes, about once a day.

#### Cross-examination.

#### Questions by Mr. FENTON:

— About how long will this interruption be, at the time the train is passing, as you remember?

A. Why, I cannot tell you, Mr. Fenton. It is an appreciable length of time.

Q. A minute or a minute-and-a-half?

A. When the train arrives, say, at the corner until it has passed off from the next block above.

Q. While it is running 200 feet?

A. Yes, or more than that.

Q. About 200?

A. 300 to 320.

Q. The width of the block is 200 feet, and the two streets—80 feet—320 feet; and while the train is running, passing over that space, public business is interrupted by the noise and movement of the train?

A. A little bit more than that. When one train passes—  
722 they send out one train that has two engines. That takes more time.

Q. Since when have they removed the east portion of the court house? When was that done?

A. That was done in vacation last summer.

Q. And what is that wall that is next to the Fourth Street side, between your courtroom, or the courtroom over which you now preside—what kind of a wall is that? A plank wall?

A. What has been put in since they cut down the building is only plank-boards, and papered on the inside.

Q. Temporary arrangement?

A. Yes, since last June, or since last July.

Q. The county is now engaged in building a courthouse to occupy the entire block, as I understand.

A. Well, I presume so. Nothing laid out except the east side.

Q. Do you know the size of the new part being laid out on the east of the present building there? About what the size is?

A. I have understood it to be 70 feet wide, 200 feet long.

Q. And as far as they have progressed is the excavation and the building of the piers?

A. Yes.

Redirect examination.

Q. I forgot to ask, Judge; what is the effect in Judge Gantenbein's department, or the department which is at the north?

A. Substantially the same. Of course you can hear now more distinctly in No. 3 than you can in No. 4?

Q. Yes.

A. But the passage of the trains renders it necessary to suspend business in either of the courts.

Witness excused.

723 A. L. BARBUR, a witness called on behalf of the defense, being first duly sworn, testified as follows.

Direct examination.

Questions by Mr. KAVANAUGH:

— Mr. Barbur, what official position do you hold in this City?

A. Auditor of the City of Portland.

Q. How long have you been Auditor?

A. Since July, 1907.

Q. In your position as Auditor, are you present at the Council Meetings that are held in the Council Chamber in the City Hall?

A. Yes, sir.

Q. Also at some committee meetings held there?

A. Yes, sir.

Q. Mr. Barbur, what is the effect on public business in the Council Chamber of the Council, the Executive Board or other boards or committees of the running of steam locomotives on Fourth Street?

A. Well, business is always suspended; always has been since I have been there, when the train first comes within reasonable hearing distance, business is always suspended.

Q. And continues suspended until it is passed?

A. Yes.

Q. Are some of the trains pretty long?

A. Well, the noise of the trains that have double headers—that is, the engines running in front and sometimes three engines, particularly, the noise is made so that it interrupts the proceedings while the entire train is passing; of course, the one engine ahead, or two as it might be, and the engine coming behind.

724 Q. Is there any distinct vibration in the Chamber?



A. I think there is a rumbling there always more or less.

No cross-examination.

Witness excused.

725 THEODORE KRUSE, a witness called on behalf of the defense, being first duly sworn, testified as follows.

Direct examination.

Questions by Mr. KAVANAUGH:

— Your name is Theodore Kruse?

A. Theodore Kruse.

Q. What is your business?

A. Hotel and restaurant.

Q. Where is your place of business?

A. On Fourth and Alder street.

Q. What is known as the Belvedere Hotel?

A. Belvedere and Louvre.

Q. Louvre. How long have you been engaged in business there,

Mr. Kruse?

A. Three years.

Q. Were you engaged in business prior to that?

A. On Fourth and Stark.

Q. Kruse's Restaurant?

726 A. Yes, sir, Kruse's Restaurant.

Q. Does the Fourth Street road run in front of your building?

A. Yes, sir.

Q. Mr. Kruse, what is the effect on your business there of the operation of steam locomotives on the railroad line on Fourth Street?

A. Well, the train and locomotives that are passing the lobby or the office of the hotel particularly,—we have to suspend business. We cannot converse with guests nor can we converse through the phone, and the guests particularly complain. It inconveniences a great deal because we have a great many long distance calls which must be interrupted and the line held open during the time the train passes as the rumbling noise of the train makes conversation absolutely indistinct.

Q. What, if any, effect does the smoke and the dust and the cinders have on your business?

A. Dust and cinders I have not noticed any, except dust and cinders. A great deal of smoke at times—a great deal depends upon the atmosphere, whether the atmosphere is heavy or not, and the direction of the wind. But at certain times all our rooms which are generally open for ventilation will be full of smoke after the train passes and in fact at times it is so bad we must close our transoms in the public diningrooms in order to keep the smoke out.

Q. What effect has it on the public diningroom, Mr. Kruse?

A. Well, it has that effect as far as the smoke is concerned. If the atmosphere is heavy the smoke will come through the windows

and transoms, if open, and will generally—I have instructed the men to close the transoms whenever the train passes.

727 Q. You mean to keep them open for ventilation during most of the time, do you?

A. Oh, yes, we have them open.

Q. Is there any vibration noticeable in your building?

A. I couldn't say anything about vibration.

Q. What effect has it upon your guests in the hotel?

A. It causes a great deal of inconvenience. The guests who know the house and have been with me before, will not take a room on the Fourth Street side if they can get a room on the Alder Street side, and when they take a Fourth Street room, it is with the understanding that they will be moved the next day so that causes, of course, a great deal of inconvenience.

Q. How about the transients who are staying in these rooms, do you have any complaint?

A. Oh, yes, I generally keep them only one night and then, of course, if I move them into the Alder Street side I can keep them more than that.

Q. Do your Alder Street rooms rent better than the Fourth Street rooms?

A. Yes, for that reason.

Cross-examination.

Questions by Mr. FENTON:

— What difference do you make in the charge for your rooms on Fourth Street and rooms on the Alder Street side?

A. We do not make any difference.

Q. You get the same rent per room for rooms on the Fourth Street side as you do on the Alder Street side?

A. Yes.

Q. Well if the transients, Mr. Kruse, would only stay in the rooms on the Fourth Street a night, and you lose them on  
728 account of the noise, what do you put them there for?

A. Well, I cannot very well send them away as long as I have a room.

Q. I see. Now, how long have you been running that hotel, you say?

A. Three years.

Q. The Belvedere Hotel there was the old——

A. Holton House.

Q. Holton House, run by Dan Holton for a great many years?

A. Yes.

Q. How long has it been an hotel?

A. Well, to my knowledge it has been twenty years.

Q. Built by John Wilson, wasn't it?

A. I believe it was.

Q. And owned now by the Wilson estate?

A. I think so.

Q. 100 feet square?

A. 100 x 75.

Q. 100 on Fourth Street and 75 on Alder?

A. No, 75 on Fourth.

Q. Did it adjoin the Rosenblatt property?

A. Yes, now owned by Sweeney.

Q. Now Lipman & Wolfe's Annex, Department store?

A. Yes.

Q. The old Rosenblatt home, wasn't it.

A. I believe it was.

Q. That is, Gus Rosenblatt's father, and S. Rosenblatt?

A. Yes.

Q. That was built primarily for an hotel, wasn't it, that building?

A. So I understand.

729 Q. And the Louvre is your restaurant? And what floor space does that cover?

A. The Louvre covers about 50 x 70 approximately.

Q. That is a popular modern restaurant?

A. Yes.

Q. And serves and caters to the public outside of the guests at the hotel?

A. Yes, sir.

Q. And you have an orchestra there in the evenings, and serve fine dinners to the public. That is right, isn't it?

A. Yes, sir.

Q. And it is a popular resort?

A. Yes.

Q. I will ask you what kind of light you use in the restaurant?

A. We use electric light.

Q. Brilliantly lighted with electric lights at night?

A. Yes.

Q. You expended a great deal of money to remodel that room, didn't you?

A. Yes, I spent considerable money.

Q. You went from Fourth and Stark, the one story or two story brick, owned by Rufus Mallory, where you maintained Kruse's restaurant for a number of years, and selected this site for your place of business?

A. Yes.

Q. When did you make the change?

A. About three years ago?

Q. How long were you at Fourth and Stark?

A. I was there about ten years.

Q. And you conducted a successful business there, didn't you?

730 A. I did.

Q. And are conducting a successful business at Fourth and Alder?

A. Yes.

Q. Are you there under a time lease?

A. Yes.

Q. How long has your lease yet to run?

A. Two and a half years.

Q. May I ask what rent you pay?

A. Eight hundred a month.

Q. For the entire building?

A. Yes.

Q. And you sub-let any?

A. Nothing, no.

Q. You pay all the taxes and insurance?

A. No, I pay nothing.

Q. You just pay Eight hundred per month?

A. Yes, just the rent.

Q. Have you applied for a renewal?

A. Not yet, no, sir.

Q. Do you have any trouble with your side-walk lights in your basement?

A. No, I have no sidewalk lights.

Q. The basement does not go out under the side-walk?

A. No, sir.

Q. I mean the basement does not extend?

A. No, the basement does not extend.

Q. You have street lights, do you?

A. Yes, sir.

Q. What are they?

A. Gas.

Q. Do you use any Tungsten burners?

731 A. No, I do not.

Q. Never installed them?

A. Yes, I used some a few dozens or so, but they broke within a very short time so I did not renew them.

Q. That has been the experience of most of the customers of that light as far as you know?

A. I understand so.

Q. Without reference to where the building is located?

A. I believe that is so.

Q. Now these long phone conversations—long distance conversations, your phone is in the open, is it, or is it in a room?

A. No, in a booth.

Q. Door closed,—wooden booth?

A. Yes, long-distance booth.

Q. And you cannot talk over long-distance if the door is closed in the booth?

A. No.

Q. Is the booth next to Fourth Street?

A. Yes, sir.

Q. Up next to the wall?

A. Not against the outside wall, no.

Q. Close to the entrance?

A. I should say fifteen feet.

Q. Interrupted for a minute or minute and a half while the train goes by?

- A. Only during the time of the passage of the train.  
Q. Whatever length of time it is.

Redirect examination.

Questions by Mr. KAVANAUGH:

- Do you know whether the destruction of your Tungsten lamps was caused by the trains?

- 732 A. No, I never inquired into the cause of it.

Witness excused.

- 733 BEN SELLING, a witness called on behalf of the defense, being first duly sworn, testified as follows:

Direct examination.

Questions by Mr. KAVANAUGH:

- Mr. Selling, you have lived in the City a great many years?

A. Yes, sir.

Q. How many years?

A. Forty.

Q. Forty years. You are at present State Senator for this County?

A. Yes, sir.

Q. Where is your place of business?

A. Fourth and Morrison.

Q. How deep is your floor on Morrison Street?

A. Sixty-five feet.

Q. On Fourth Street?

A. Practically 100 feet.

Q. And how many stories in height?

A. Two stories at present.

Q. The Fourth Street car line runs along the Fourth Street face of your building?

A. Yes, sir.

Q. Will you tell the Court, Mr. Selling, what effect the operation of the steam locomotives and cars on that road has upon your business, clothing store business?

A. I don't understand the question,—you mean in the abstract?

A. No, particularly. What inconvenience or discomfort or  
734 annoyance, or injury it causes.

A. During the passage of trains the building shakes.

Mr. FENTON: Louder.

A. During the passage of trains the building shakes perceptibly. The smoke at times creates a little inconvenience.

Q. What effect does it have on conversation with your customers?

A. During the passage of trains it is a little difficult to carry on transactions.

Q. How does it affect the telephone?

A. I never paid any attention to the telephone.

Q. You don't notice that?

A. No.

Q. How does it affect the life of your lights?

A. I am not able to say. We have just installed a new light and I do not—

Q. How is it on your old light?

A. Well, that is very poor, because— We are using a new light and it is not a Tungsten light and we find that a great many lamps are broken. I would not be in a position to say that it was occasioned directly by the trains. Pretty near all the lights in our windows are slanting. We have quite a large number of lamps broken. I could not compare because recently installed.

Q. How are the lights on Fourth Street as compared with the lights on Morrison?

A. I could not tell you. I do not know.

Q. Has the vibration any effect upon your company's show windows?

A. No, sir.

735 Cross-examination.

Questions by Mr. FENTON:

— Senator Selling, when did you open up your place of business there on Fourth and Morrison?

A. Ten years ago.

Q. And you remodeled that store and expended considerable money to put in show windows and plate glass?

A. Yes sir.

Q. That building has been there for twenty-five years, hasn't it?

A. Yes, sir.

Q. Who constructed that originally?

A. Sir?

Q. Who constructed that originally?

A. That belongs to the Mann estate. I think the Pete Hardman estate.

Q. Did you buy the property?

A. No, sir.

Q. You have a lease?

A. Yes, sir.

Q. What rent do you pay for that?

A. Twelve hundred.

Q. A month.

A. Yes, sir.

Q. You have how much space?

A. I rent 100 feet on Fourth and 100 on Morrison,—I sublet a part.

Q. You have two floors?

A. I have the entire building and only occupy the part of two floors.

Q. A three-story building?

A. Yes, sir.

Q. What is it used for upstairs above you?



A. I intend to occupy a part of the third floor myself.  
736 The other part is vacant.

Q. Is it loft construction,—I mean all one large room—the third floor?

A. Will be all one when I get through. I am making alterations now.

Q. When did you take such lease?

A. 10 or 11 years ago.

Q. How long a term?

A. Originally 10 years. My original lease expires next July.

Q. And did you get it renewed?

A. Yes, sir.

Q. How long a term?

A. Three years.

Q. Same rental?

A. No, sir.

Q. Increased?

A. Fifty per cent. increase.

Q. Twelve hundred and fifty?

A. Twelve hundred. We will have to pay Eighteen hundred after next June-July.

Q. So that rents have advanced about 50% during the time you occupied the property?

A. Yes, sir.

Q. When you went there the freight trains were operated on Fourth Street just as they are now?

A. Yes, sir; not so frequently, but they were there.

Q. Passenger trains were operated but not quite so frequently?

A. Yes, sir.

Q. Where were you before you came to Fourth Street, what place of business?

A. Sir?

737 Q. Where were you before you came to Fourth Street?

A. I was on Third and Oak and am still in the same place.

Q. Have another place of business down at Third and Oak?

A. Yes, sir.

Q. Near what was formerly the—

A. Sherlock Building, Third and Oak.

Q. You came to Fourth and Morrison as an improvement on this?

A. Yes, sir, I rented that on account of the location.

Q. About ten years ago?

A. Sir?

Q. About ten years ago?

A. Yes, sir.

Q. What is your line of business?

A. Clothing and gent's furnishings.

Q. Special line of clothing and gent's furnishings?

A. Men's and boys'.

Q. No trouble with your show windows so far as the goods falling down?

A. No, sir, never had any trouble on that account.

Witness excused.

738

C. K. HENRY, a witness called on behalf of the defendant, being first duly sworn, testified as follows:

Direct examination.

Questions by Mr. KAVANAUGH:

— Mr. Henry, how long have you lived in Portland?

A. Twenty years.

Q. Engaged in the real estate business?

A. Yes, sir.

Q. Most of the time?

A. All of the time.

Q. Where is your office now?

A. Corner of Fourth and Oak.

Q. Who owns the building where your office is?

A. I do.

Q. When was that constructed?

A. Just about finished now.

Q. How long have you been in that building?

A. A little over two months.

Q. The Fourth Street line runs in front of your building?

A. Yes, sir.

Q. You have had occasion to observe the noise and—

A. Yes, sir.

Q. —vibration caused by the railroad?

A. Rumbling, yes, sir.

Q. What effect has that on your business and on your building?

A. Well, I don't know as it has any effect on the business. As to the building, I bought the ground a year ago in July. That was after they had agreed, or as I understood it, had agreed that this heavy service would be removed from this street, and in leasing my buildings, leasing the offices to tenants, I always used that as an argument why they should come over to that new location. A great many objected on account of the railroad on Fourth Street. I said, it is only a matter of a few months until they will move away.

Q. Did you find that the tenants took that into view when they were making leases?

A. Yes, sir, a good many did.

Q. Seeking locations?

A. A great many did.

Q. General objection to the railroad?

A. They always endeavored to get lower rents on account of being on Fourth Street.

Q. Do you know what effect the railroad has thereon—You have engaged to a considerable extent in buying and selling real estate, have you not?

A. Yes, sir.

Q. Do you think it has any effect on the value of the real estate?

A. Yes, property is less valuable on Fourth Street than it is either on Third or on Fifth on account of the steam railroad. If it was electrified I do not think it would damage it at all.

Q. You think property would be as high there?

A. Just as high.

Q. What percentage of difference would you say there is?

A. I should say from 10 to 20 per cent.

Q. Where is your office located with reference to the street?

A. Mine is right on Fourth Street.

740 Q. How high up?

A. On the street,—first floor.

Q. Are your phones near the street?

A. Some of them; we have several.

Q. How does it affect telephone conversation?

A. When a train is passing we have to suspend.

#### Cross-examination.

#### Questions by Mr. FENTON:

— Mr. Henry, when you say they had agreed to remove their heavy traffic on Fourth Street, to whom did you refer, and how did you get the understanding?

A. The understanding was at that time, I believe was, that the Council had served notice they should move, and the company agreed to take off the heavy trains, and were going to switch them around by Milwaukie and Oswego.

Q. You didn't understand there was any agreement with the City on that subject?

A. We understood——

Q. Rumor, I suppose?

A. Yes, sir, newspaper statement.

Q. You know, as a matter of fact that the company said when this matter was under discussion that it did expect to build its Beaverton and Oswego——

A. Cut-off.

Q. Cut-off,—and it would then probably remove most if not all of its freight traffic, but it still insisted upon its right to own its franchise and operate its trains there and that was satisfactory to the Council?

A. The impression I had and nearly all the tenants who brought up the question would say, they were going to build a cut-off and run freight trains around, and it wouldn't be long until they

741 would electrify this part or put on gasoline motors.

Q. That was not a matter of agreement?

A. I do not know as to agreement.

Q. But a matter of policy and convenience on the part of the company.

A. Yes, I think that is all right.

Q. And you don't know but what that is the intention of the company now?

A. Don't know; only saying my impression at the time.

Q. As a matter of fact, the ordinance here attempts to prohibit the use of that line for freight business at all. You understand it that way, don't you?

A. I really paid no attention to the ordinance, only just what I have seen published in the papers.

Q. As a matter of fact, Mr. Henry, you bought that quarter block where your building now stands—

A. Yes.

Q. At a price of \$125,000.00?

A. Yes.

Q. You paid \$115,000.00?

A. No, I paid more than that.

Q. Well, the owner's price was \$125,000 and you got a discount?

A. I got a discount but paid more than \$115,000. I have forgotten just what.

Q. You built the building at a cost, probably of \$150,000?

A. A little less than \$150,000.

Q. Six story office building?

A. Yes, sir.

Q. Mill construction with some steel?

A. Steel and iron columns, yes, sir.

Q. Yes. Now, that building was open for tenants when?

742 A. I think we began about the first of November with a few on the ground floor.

Q. And what percentage of the building is now occupied?

A. About 90%, nearly 95%.

Q. That is to say, you opened this office building to the public November 1st and now, on December 3rd it is 95% full.

A. Yes, sir.

Q. Satisfactory time leases in most instances?

A. I am satisfied.

Q. Rentals entirely satisfactory to you?

A. Yes, sir.

Q. You have a department of the United States Post Office there?

A. Yes, sir.

Q. Under a long time lease?

A. Yes, sir.

Q. And you have some other public offices?

A. Yes, I have made a great many efforts to get them there, Mr. Fenton. It is a very comfortable, attractive building and I induced them to come.

Q. A good many tenants who argued with you that your rates were too high, they wanted lower rates they said because of the Fourth Street train being there?

A. Well, yes.

Q. You succeeded in convincing them that the rates were reasonable, and got 95% or 90% occupied?

A. I did so by holding out the inducement that the line would be discontinued.

Q. Certainly we all hope it may be modified in some respects. As a matter of fact that building was finished and opened to the public November 1st and is now 95% full.

A. Yes, sir.

743 Q. How many offices are in that building?

A. 155.

Q. May I ask you what your gross income would be?

A. About \$3200 per month.

Q. And your operating expenses?

A. Well, that is a question yet. I am buying heat from across the street and am having negotiations with the electric company.

Q. Won't it be fully \$700 a month?

A. Yes, it will.

Q. Between \$700 and \$800?

A. Not counting taxes and insurance.

Q. Leaving \$2500 net, exclusive of taxes and insurance?

A. You are getting some information here about real estate to-day.

Q. Now, you say that values on Fifth Street are from 10% to 20% more than on Fourth Street?

A. No, I think property on Fourth Street would be from 10 to 20% higher in value than it is now if the steam road would be electrified.

Q. In other words you think Fourth Street a better street than Fifth Street if the railroad was off?

A. If it had a similar electric line?

Q. Yes.

A. I do.

Q. Don't you know as a matter of fact, Mr. Henry, the history of this town has been Front Street first; First Street next; Second Street, because being the Chinese quarter, rejected; Third Street for many years as a principal thoroughfare of the City and now second class because of the lack of modern buildings on it;

744 Fourth Street comes next, then Fifth Street, the last three years built almost entirely new from Morrison to Ankeny on both sides of the Street.

A. Yes, sir.

Q. And has a double street car line upon it; then Sixth Street comes next with large modern buildings on it, and Seventh Street is approaching the same.

A. Yes.

Q. The growth of the City then, with modern buildings, is West of Third Street, isn't it?

A. That has been the last two or three years, but I do not think it will continue.

Q. No, we hope it won't because it would go up to Tenth and leave us. But the largest department store of the City is being built to-day between Tenth and West Park and Morrison and Alder?

A. Yes, sir, and I think they are making a mistake—a big mistake in doing so.

Q. That is Olds, Wortman & King?

A. Yes, sir.

Q. The former home of Governor Pennoyer?

A. Yes, sir.

Q. One of the largest office buildings in the City is being built

to-day by the Portland Railway Light & Power Company at Seventh and Alder; nine stories high and 100 feet square?

A. One of the large ones.

Q. Ben Selling, who was a witness here, paid \$270,000 for less than a quarter of a block on Sixth and Alder this last summer?

A. Yes, sir.

745 Q. The largest department store in the Northwest is on Sixth and Alder?

A. Yes, sir.

Q. 11-story, modern steel building?

A. Yes, sir, it is just finished.

Q. The Wells-Fargo Building is on Sixth and Oak, a 12-story building, the largest in the city?

A. Yes.

Q. So the growth of the city is west, and it has flowed over Oak Street, hasn't it?

A. Over Oak.

Q. Flowed over and beyond Oak Street?

A. Yes, sir, on Fourth.

Q. I mean Fourth.

A. Yes, sir.

Q. On Fourth and Oak there is the Board of Trade Building which cost between five and six hundred thousand dollars, and the Chamber of Commerce Building, covering the south half of that block, eight stories high, with plans adopted to make it two stories higher?

A. Yes, sir.

Q. Office building entirely?

A. Yes, sir.

Q. One hundred feet, eight stories high.

A. Fourth Street side.

Q. The Lewis Building, a ten story concrete building, corner Fourth and Oak?

A. Yes, sir.

Q. Sixty by one hundred feet, devoted entirely to offices. Do you know what percent is taken?

A. No.

Q. The building will not be completed for probably ninety days yet.

— — —

746 By Mr. KAVANAUGH:

— Will you take the stand and testify?

Q. Isn't that true, it will not be completed for 90 days?

A. That is my impression.

Q. You know that from your observation?

A. Yes, sir.

Q. And the Board of Trade Building is an office building modern and complete in every particular, and occupied by offices exclusively?

A. Yes, sir.



Q. Completely filled, isn't it?

A. I think so.

Q. And a waiting list?

A. I think so.

Q. Yes. The Weinhardt block covers the whole block between Oak, Pine, Fourth and Fifth?

A. It does.

Q. Seven story building?

A. Yes.

Q. Completely rented?

A. Yes, sir, on old leases.

Q. Haven't they adopted plans to make that an office building at the expiration of the present leases?

A. I do not think so. I am trying to persuade them to do it, as you can readily understand for your benefit and mine.

Q. Isn't it a fact the modern office buildings going up now within two or three blocks from the Lewis Building or your building has a waiting list before completed?

A. Yes, sir, any good office building, conveniently arranged.

Q. But on Fourth Street it would make no difference?

747 A. If on Third or Second Street now, if well built and well planned, with plenty of light and air, they would be just as much sought for as where they are.

Q. The ground, and in fact the properties, in your judgment, that are now on Fourth Street, would be more valuable if the steam road were removed?

A. Oh, yes. I have no hesitancy in saying that.

Q. If an electric line was substituted? An electric line would benefit the whole street through there?

A. Yes, sir.

Redirect examination.

Q. What you would like to have, Mr. Henry, would be for this company or some other to retain this franchise on Fourth Street, and convert that into an electric suburban and city line?

A. Yes, sir.

Q. Would be a public benefit?

A. Yes, I think it would, if the steam was off and electric on.

Witness excused.

748 Mr. A. C. McMICKEN, a witness called on behalf of the plaintiff in rebuttal, being first duly sworn, testified as follows:

Direct examination.

Questions by Mr. FENTON:

I would like to call this witness a little out of order in rebuttal.

Q. Mr. McMicken, what is your business?

A. I am contract agent for the Portland Railway Light and Power Company.

Q. Are you familiar with what is called the Tungsten light?

A. I am.

Q. How long has that been introduced and in use in this city?

A. About a year and a half.

Q. What character of light is it, as to delicacy of operation, if I may use the expression?

A. The Tungsten lamp is—has a metal filament and is a new discovery in the way of an electric light. The peculiarity of the lamp is the delicacy of the metal filament. By delicacy I mean that the light will not stand severe jars.

Q. What experience have you had with respect to this lamp throughout the City as to breakages on account of the delicacy of the lamp?

A. Well, we have had quite a little breakage and still, probably the last six months we have not had as much as previous to that time due to improvements.

749 Q. Is the lamp under process of improvement so as to avoid this delicate thing which is affected by vibration or by currents of air or whatever may affect it?

A. Yes, the process of manufacture has made an improvement in the lamp. The Tungsten metal is the same as in the original lamp and the process of manufacture has been improved and the suspension of the filament has been so changed that the percentage of breakage has been greatly reduced.

Q. How much has that percentage been reduced by reason of the improvement?

A. In the last six months, or eight months I think it has possibly been reduced one half, is our experience.

Q. And would you say, as an expert, or dealer whether it can be still further reduced in your judgment, or would you be able to say?

A. I do not think they can make very great changes in the lamp as it stands at present.

Q. Is there another lamp that is taking its place, serving the same purpose, do you know?

A. There are other lamps being introduced which give practically the same light but their efficiency as to electric current consumed is not as high.

Q. Now, what experience have you as to the lights which your company has installed on Fourth Street, I mean public lamps, if you have any?

A. Well, the only place we have Tungsten lamps on Fourth Street that the company maintains are in some ornamental boulevard posts on the curb lines.

Q. Where are they?

750 A. Well there are two posts on the Southwest corner of Fourth and Morrison Streets; one post on the northeast corner of Fourth and Washington Streets, that I recall at the present time.

Q. They are installed for Steinbach & Company at Fourth and Morrison and for Woodward and Clarke at Fourth and Washington?

A. No, for the Harrington Cigar store, cata-corner from Woodward & Clarke.

Q. What has been your experience as to breakage in these Tungsten lamps during that time?

A. We have had no greater breakage there than any place else in the city. They average better than 800 hours life a lamp.

Q. That is the breakage on Fourth Street is no greater than elsewhere?

A. Not on these boulevard posts.

#### Cross-examination.

#### Questions by Mr. KAVANAUGH:

— Has been considerably greater in Mr. Gray's store on Fourth Street than on Morrison Street side?

A. I could not say as to that; we do not maintain or renew free of charge Tungsten lamp installations in any of our customers' premises; therefore we have no record of that.

Q. You don't know anything about his light?

A. I know what his lights are, yes, sir.

Q. You remember his going up and making complaint to the company concerning them?

A. When he first put in the installation, he complained about the lamps breaking and burning out, but I have seen no complaints from him lately.

Q. He has just testified on the stand here that the jar and vibration of the car put out his lights on Fourth Street to a much greater extent than on Morrison Street.

A. Well, I could not say as to that; we have no records.

Q. You have no reason to know but what that is true?

A. I don't know anything about it.

#### Redirect examination.

Q. Just one question, I did not ask, with the Court's permission—does this Tungsten lamp break when the current is on, and it is lighted, or do they break when cold, and the current off?

A. Usually when cold.

Q. Can you explain the reason why?

A. Yes, sir.

Q. Why?

A. Due to the composition of the filament; the filament of the Tungsten lamp is a metal filament, and it is of such a nature that in the manufacture of the lamp, the metal cannot be drawn as iron or steel is ordinarily drawn, but the metal filament is made by heating to a very high heat, and squirting it through steel dies, and making the thread used as a filament of the lamp. Of course, the different size lamps have different size filaments, and the smaller the lamp, the smaller the filament, and necessarily very brittle and break under less strain than the larger size lamps. Of course the

752 metal acts the same as any metal when it is warm. It expands to a certain extent and is more pliable. Therefore when the current is on there is very little liability to break.

Q. When the current is off, and it is cold, it is liable to break in the small filament?

A. Yes, sir.

Recross-examination.

Q. Exceedingly sensitive to jar and vibration?

A. Well, more sensitive than any other form of light, yes.

Witness excused.

753 F. COOPER, a witness called on behalf of the defense, being first duly sworn, testified as follows:

Direct examination.

Questions by Mr. KAVANAUGH:

— Mr. Cooper, what are your initials?

A. "F."

Q. What is your business?

A. Superintendent of Transportation for the Portland Railway, Light & Power Company.

Q. Are you able to say, Mr. Cooper, how many cars of your company cross Fourth Street daily? I mean how many crossings are made at, perhaps, any smaller space of time than a day would be.

A. I can by referring to notes I made.

Q. Have you the notes with you?

A. Yes.

Q. Just refer to them.

A. What particular crossings do you want?

Q. I want the crossings at Glisan, Burnside, Washington and Morrison. Are there any crossings besides those?

A. Glisan, Burnside, Washington and Morrison.

Q. Does the Fifth Street cross?

A. That is stopped now. At Fourth and Glisan, there are 632 cars cross per day; that is, crossing there one way or the other.

Q. At Burnside?

A. At Burnside there are 645.

Q. At Washington?

A. At Washington, 1105.

Q. And Morrison?

A. Morrison, there are 552.

Q. Have you totaled that?

A. Well, those are the totals.

Q. I mean altogether?

A. No, I didn't.

754 Q. What hours do they run between?

A. Well, from—

Mr. FENTON: That is twenty four hours.

Mr. KAVANAUGH: There is part of the day they don't run.

A. That is figured on a nineteen—eighteen hour basis. These figures are—I would not say they are to one; in this '1105 it might be 1106, or it might be 1104, but I have took them from our schedules; they would not vary more than one or two crossings.

Q. State to the court if you know how much time is lost by the cars and people in the cars, by reason of the crossings of the Fourth Street road across these tracks—as to whether it is considerable or not.

A. Well, we never pay any attention to the time on the Fourth Street line at all.

Q. But a car has to come to a stop and wait until the train passes, however long a time it is?

A. Yes, but our schedules are so arranged that——

Q. You make allowance for that?

A. We make allowance for little stops like that.

Q. You have noticed it often, at times, haven't you, Mr. Cooper, that it stops several of your cars?

A. Yes.

Q. Some times three or four?

A. On Washington Street, it don't take long for three or four cars to pile up.

Q. What effect does it have on pedestrians; do they crowd up when a long train is run through?

A. Well, yes they are crowded up just the same as the cars; I have noticed when I have been on the streets, I will wait along with the other pedestrians to cross.

755 Q. When a long freight train is going through, generally a large crowd of people congregate on the side of the track, waiting for the cars?

A. Oh, yes, yes.

Cross-examination.

Questions by Mr. FENTON:

— Can you give me the number of cars that cross East First Street and Morrison?

A. East First and Morrison?

Q. Yes, daily.

A. Well, not right off, no.

Q. Can you approximate it and then later give me the exact number?

A. Well, on the Brooklyn Line, I will say there is sixteen per hour—that is the maximum.

Q. How many hours—sixteen hours?

A. No, not sixteen hours; that is during the heavy rush I am giving you now; that would be during the heavy rush at night. I am just giving you the largest number that cross.

Q. What I want—is the number of cars that cross East Morrison Street and First Street, going either way.

A. I could not give that to you for the eighteen hours until I see the schedule and count every trip.

Q. How long would it take you to do that?

A. Oh, it might take me half an hour when I get down to the office.

Q. Will you be good enough to do that and come back here before five?

A. Yes, yes, I can do that.

Q. I don't care for anything—you might also get the normal traffic across East First and Madison, I think it is when the Madison Street bridge is in operation.

756 A. I have nothing to do with that. I could not give that.

Q. Then, give me the traffic on East First and Morrison Street- and get back here, if you will.

Redirect examination.

Questions by Mr. BENBOW:

Q. You are familiar with the foot-passengers over the streets of the city?

A. Not any more so—

Q. I mean the condition of the streets in the City as to foot passengers.

A. Yes.

Q. Are there a great many people on the streets or a few during business hours of the day? Crossing back and forth on Washington?

A. During rush hours, of course, there are more people on the streets than during the slack part of the day. The same thing applies to the street cars and we have more street cars out during the heavy traffic.

Q. During business hours of the day, is the street, sidewalk,—very full of people, nearly congested?

A. On some streets, some corners,—yes.

Q. What corners,—what streets?

A. I would say on Washington from Third to Sixth. I should think that would be about the busiest section of the city.

Q. Morrison?

A. Morrison from around Third and Morrison up to Sixth and Morrison is pretty busy.

Q. Full of people all through the business part of the day?

A. I wouldn't say full of people. Quite a good crowd on those two streets.

757 Recross-examination.

Questions by Mr. FENTON:

Q. While you are looking, Mr. Cooper, will you also look for the traffic,—the cars across Burnside and across the steel bridge? To show the traffic, the volume of traffic across the river is what I am after.

A. Very well.

Witness excused.



758 Father I. M. VASTA, a witness called on behalf of the defense, being first duly sworn, testified as follows:

Questions by Mr. KAVANAUGH:

—: Father, are you the pastor of the Italian Church?

A. Yes, sir.

Q. Where is that located?

A. Fourth and Main.

Q. How long have you been there?

A. I have been there for just a year. I came here, a year in this December.

Q. Is your Church across the street from St. Mary's Academy and college?

A. Yes, on Fourth Street.

Q. Have you frequently been in the academy?

A. I have been there several times, yes.

Q. The Fourth Street railway runs in front of your church, does it?

A. It does.

Q. And in front of St. Mary's Academy?

A. Yes sir,

Q. What effect has that on the services in your church there when it passes?

A. Very often, and always we have to stop the service.

Q. Until it passes?

A. Until it passes. Yes, sir, if we are preaching or reading the scriptures, or exercising the duties of our office, hearing confession, for instance, we have to stop. Impossible to hear what is said.

Q. Is there anything conducted in the basement of the church?

A. No.

Q. Where is your school there?

A. It is just in the old Blanchet Institute.

Q. Not so much in there. That is on Fifth Street?

A. Yes; to a certain extent, but it is a source of annoyance to us. It is a source of annoyance because the children come through from Fourth Street to school.

Q. You may state, if you know, what inconvenience it causes to St. Mary's Academy when the train goes along.

A. There are some, I suppose. I know this. I heard it said at times the teaching stops, that everything stops whenever a car goes up or down.

Q. Have you ever been in the class room?

A. No.

Q. You have been in the building though?

A. Oh, yes.

Q. How is the noise there?

A. Noise unbearable and the building shakes. Our church and our vestments; we have a brick building there and they shake.

Q. Is the vibration violent?

A. Yes, it is.

Q. Shake the lights?

A. Yes, sir, and windows.

Q. What effect has the smoke from the train when the windows are down?

A. It dirties them.

Cross-examination.

Questions by Mr. FENTON:

760 —. Father Vesta, when did you build that church there?  
A. Well, I do not know, but I think it was put up about seven years ago.

Q. How much of a church is it?

A. I cannot answer exactly.

Q. I mean in parishioners.

A. Oh, yes, in number of people, we are six thousand belonging to our church.

Q. That includes the entire Italian colony?

A. Yes, but then, of course, they are not all Italians, that go to Church. There are Germans and there are Irish.

Q. They live anywhere in the city?

A. Yes, all over the city.

Q. Your attendance at service is about how many in number?

A. Well, all the services on Sundays most all not less than five or six hundred.

Q. Including men, women and children?

A. Yes.

Q. You haven't yourself been in the St. Mary's Academy while recitations are going on?

A. No.

Q. How long has St. Mary's Academy been there?

A. I cannot answer that question.

Q. How long have you been in the city?

A. I have been in the city about a year.

Q. Where did you come from?

A. From Lake View.

Q. Lake View, Oregon?

A. Or rather, I came from St. Ignatius Mission.

Q. St. Ignatius in Montana?

A. Yes, sir, in Montana?

761 Redirect examination.

Questions by Mr. KAVANAUGH:

—. You belong to a Jesuit order?

A. Yes, sir.

Q. And travel about a good deal?

A. Yes, sir.

Witness excused.

762 D. T. HUNT, a witness called on behalf of the defense, being first duly sworn, testified as follows:

Direct examination.

Questions by Mr. KAVANAUGH:

— Where do you reside, Mr. Hunt?

A. On Fourth Street between College and Lincoln,—right in the bend there.

Q. How long have you been there?

A. Since, I think it is April, of 1905.

Q. Does the Fourth Street car line pass in front of your residence?

A. Yes, sir.

Q. What effect has the running of cars and locomotives on that line on your residence?

A. Well, it causes it to rock quite a bit at times, and the smoke in the summer time is particularly disagreeable from their engines.

Q. Is there any vibration, rocking?

A. Yes, sir, just as I said, quite a bit of rocking at times; that is caused entirely by the length and weight of its trains.

Q. What about the noise being considerable?

A. Well, I should say in that case, while the noise is there, it is like everything else when you become used to it you don't notice it, to any great extent.

Q. What effect has the vibration on the building in which you live?

By Mr. FENTON: You mean the rocking?

763 Mr. KAVANAUGH: Yes.

Mr. FENTON: He said the residence rocks.

A. The greatest trouble we have had is with our gas mantels. I rocks it to such an extent that the mantels go to pieces very quickly.

Q. Does it shake your fixtures in any other way, loosen them up?

A. You can hear the globes rattle, but it doesn't hurt the fixture any.

Q. Does it destroy the mantels?

A. Oh, yes.

Q. Is that frequent?

A. Well, I would say that a 35 cent mantel will generally go to pieces in something like ten days.

Q. How long would they last if no vibration,—or ordinarily?

By Mr. FENTON: If he knows.

Q. If you know.

A. That is something I am not in position to state, but of course quite a long time.

Q. You can see them shake?

A. You know those things have more or less asbestos or something of that kind in them. After it is burnt it takes out the elasticity there is there and they do not stand shaking.

Q. You find that a desirable place to live with relation to the road?

A. No, sir.

764 Q. You expect to continue living there, do you?

A. No, sir, I do not.

Q. Why do you expect to move?

A. Two reasons for that. In the first place we are about to accomplish what we have waited for a long time, to be able to build a home. We possibly wouldn't move so quick if it hadn't been for this disagreeable feature of living on that railroad.

Cross-examination.

Questions by Mr. FENTON:

— How long have you lived there?

A. Since April, 1905, sir.

Q. Do you live in a rented house?

A. Yes, sir.

Q. What rent do you pay?

A. Twenty-six dollars.

Q. What size of house is it?

A. A five room flat, sir.

Q. Who owns it?

A. J. W. Curran.

Q. Built new was it?

A. Oh, no, sir.

Q. How long has it been built probably?

A. Why I would imagine possibly eight or ten years, *with* without knowing.

Q. Is the entire neighborhood built up with residences? Practically covering all the ground adjoining the street on both sides?

A. Yes, sir.

765 Q. A good many new residences in that section the last two or three years?

A. No, sir, the only new residence there is the flat that sets this side of us,—that is, north of us, built by Mr. Farmer there two or three years ago.

Q. How much of a flat is that?

A. That has six compartments in it.

Q. All the other space along there in that vicinity is covered by residences that have been built a good many years?

A. Yes, sir; are all old houses.

Q. But occupied?

A. Yes, sir.

Q. No vacant houses along there, are there?

A. No, sir, if there are any they do not stand vacant long.

Q. Fill right up?

A. Fill right up.

Q. Rents there are about the same as for the same character of houses in similar neighborhoods, or cheaper on account of close in?

A. I would imagine the rents there to compare favorably with rents in other parts of town the same distance,—downtown distance.

Q. You said this house here rocked? You don't mean the house rocks like a cradle?

A. It reminds you of that sometimes, if you are in bed.

Q. You do not mean to say—have you ever been in an earthquake?

A. Yes, sir.

Q. And been awakened with an earthquake motion?

A. Yes, sir.

Q. Now, you don't mean to say that that is the way this vibration or rocking is?

A. No, I say it reminds you that you might be rocking.

766 Q. Yes, but you are not?

A. I tell you;—there is one thing there about that particular house that we are in,—Why it is on a fill and an old fill and that possibly may have something to do with it. It is not solid ground.

Q. So you have a house there that is not very well supported on the foundations?

A. It is supported all right, but I imagine from what people say,—it was before my time—but they tell me that before the street there was filled on this same fill—

Q. It is filled ground?

A. Yes, sir, has been for a number of years.

Q. That probably has caused the unusual vibration.

A. Helps some and we are right on the bend too.

Q. On the curve?

A. Yes, sir.

Q. Between Lincoln—

A. And College.

Q. And College. Which side of the street?

A. East side.

Q. What number?

A. 546½.

Q. And you mean to be understood as saying that there is an unusual amount of vibration in the house when the trains go by?

A. Well, there is quite a bit of it; it varies at times, owing to the length and weight of the train.

Q. You don't mean to say that the house moves that way, like that window curtain?

A. I expect you could discover some of that motion if you could get a glass there.

Q. But you would have to use an instrument like they use to measure—

767 A. Yes.

Q. Earthquakes to tell?

A. Yes, it doesn't rock enough to discover just with the naked eye.

Q. You feel a motion, though, a tremble?

A. Yes, sir, and that causes fixtures to rattle.

Q. Let me ask you if you had any experience with mantels in any other residence in the city.

A. Yes, sir.

Q. Have you used them in any other residence?

A. Yes, sir.

Q. The ordinary mantel?

A. Yes, the ordinary mantel.

Q. Same kind that you used up there?

A. Yes, sir.

Q. But you have never compared to see how much longer they would last than those you have in your house?

A. Not by actual time, no, sir.

Q. Those are very delicate things those mantels, are they not?

A. Very delicate after once lighted.

Q. If your fixtures are suspended from the wall down, and are not bracket fixtures or solid fixtures when you turn the light on or jar your fixtures it would shake your mantel, would it not?

A. There is some motion to any fixture when you turn the light on.

Q. You use the electric lighting appliances to turn the gas?

A. No. No, it is just regular, just like that fixture there; just the regular gas fixture.

Q. And your mantels?

A. Stand up.

768 Q. Stand up. But not heavy fixtures like that?

A. No.

Q. Light house fixtures,—five room house?

A. Yes.

Q. Ordinary movement of that fixture would jostle that mantel some, wouldn't it?

A. Yes, sir.

Q. You know, as a matter of fact, those mantels do not last more than three weeks in these ordinary houses after they are burned?

A. A good mantel should.

Q. But they don't as a matter of fact, as supplied in this market?

A. We sell mantels ourselves.

Q. I mean the mantels ordinarily furnished to the trade here do not last over three weeks in an ordinary home in this city if they are used, do they?

A. I would be very much disappointed to feel that mantels would not last longer than that.

Redirect examination.

Questions by Mr. KAVANAUGH:

— Are you in the mantel business?

A. No, sir, but we sell them, in connection with our general jobbing and repairing business you know.

Q. Do mantels in your house last as long as they should last ordinarily?

A. I have not thought so.

Witness excused.

Defense rests.



769 Mr. FENTON: I wish to say, in view of the great volume of documentary evidence offered, and the technical requirements, I am under to prove from these allegations that have been denied, I should like to have your consent to stand open until I have had it extended, and if in the record I have omitted any of the chain of title, I should like to have the privilege to submit it.

Court: Certainly, and the same to the defense.

770 L. R. FIELDS, recalled by complainant, in rebuttal, testified as follows:

Direct examination.

Questions by Mr. FENTON:

— Mr. Fields, you have been sworn. I would like to have you state to the Court the number of freight trains and passenger trains operated by the Southern Pacific Company out of the Union Depot and over East First Street on the main line of the Oregon and California Railroad company daily.

By Mr. KAVANAUGH: Objected to as incompetent, irrelevant and immaterial.

Objection overruled.

Exception taken.

A. There is twelve regular passenger trains: Four regular freight trains; there is 10 light engines without trains and an average of four extra trains.

Q. Extra freight?

A. Extra freight and extra passenger, and a movement of twenty-five switch engines in the twenty-four hours over East Morrison and East First Street.

Q. And are these crossings all at grade?

A. All at grade, yes, sir.

Q. Now, about what number of trains move over the Northern Pacific Railway at the Union Depot per day?

By Mr. KAVANAUGH: Same objection.

Objection overruled.

Exception taken.

A. I should say about twelve trains in the twenty-four hours N. P.

771 Q. About what number of trains move into the Union Depot on the Oregon Railroad & Navigation Company per day?

By Mr. KAVANAUGH: Same objection.

(Objection overruled.)

(Exception taken.)

A. About twelve trains.

Q. About what number of trains of the Astoria & Columbia River Railroad Company move into the Union Depot over the tracks from Astoria to Portland per day?

By Mr. KAVANAUGH: Same objection.

(Objection overruled.)

(Exception taken.)

A. Ten trains.

Q. About how many trains move over the North Bank, moved or operated by the Portland Seattle & Spokane Railroad, commonly known as the North Bank, into their terminals West of the Union Depot?

By Mr. KAVANAUGH: Same objection.

(Objection overruled.)

(Exception taken.)

A. About eight trains in twenty-four hours.

Q. State what the fact is as to where all these trains with their business, both freight and passenger traffic, make their delivery and are made up to take the business out. At what point in the city with reference to the North end of Fourth Street.

A. All of the freight and passengers going out and arriving on the Southern Pacific, O. R. & N., Northern Pacific, and Astoria and Columbia River Railroad, at the Union Depot, or the Northern Pacific Terminal Company. The Spokane Portland and  
772 Seattle, at their depot North of the Terminal Company's ground.

Q. Do you know, Mr. Fields the length of the new mileage from the intersection of the Beaverton-Willsburg cut-off with the West Side division over to the connection with the East side main line. Do you know the length or miles?

A. Approximately fifteen miles.

Q. That is, of new mileage?

A. That is of new mileage.

Q. Then, what is the distance from the intersection near Milwaukee into the Union Depot?

A. About four miles?

Q. Then the construction and operation of that cut-off would require the company as to the Fourth Street business to operate what additional and increased mileage beyond what it now operates; that is, how much longer would the haul be approximately?

A. It would be about ten miles.

Cross-examination.

Questions by Mr. KAVANAUGH:

— On First and East Morrison Street, Mr. Fields, you have gates to protect the public, haven't you?

A. Yes, sir.

Q. And is that true of First and Hawthorne?

A. Yes, sir.

Q. Is that true of—Burnside bridge runs over the tracks?

A. Burnside runs over.

Q. Steel bridge runs over?

A. Yes, sir.

Q. These are the only grade crossings from the bridges,—I mean direct from the bridges?

773 A. No, sir. There is East Fifth Street or Grand Avenue, that is a grade crossing. A good deal of travel over that,—street cars?

Q. Where is that crossing,—near Inman-Poulsen's mill?

A. This side of Inman-Poulsen's Mill about three blocks from Hawthorne Avenue.

Q. Isn't there a flag system there for the street car line?

A. The conductors flag the car. We have no flagging though.

Q. What is the grade of East First Street from the time you leave the Steel Bridge until you come up to Grand Avenue?

A. From the time you leave the Steel Bridge to Hawthorne Avenue it is practically level; from Hawthorne Avenue to Grand Avenue a grade very probably 25 feet to the mile.

Q. A good deal easier grade than Fourth Street?

A. Oh, certainly.

Q. How wide a right of way have you on East First Street, do you remember?

A. Well, I think the street is about 60 feet in width, and we have two tracks. We have a double track from Oak—East Oak Street to East Madison Street, and then in addition to that is the side tracks for the several industries along there.

Q. Do you have a right of way for a double track there along East First Street?

A. Yes, sir.

Q. How long is your private right of way after you leave Grand Avenue going South?

A. Well, it is from thirty—it is from forty to twenty feet.

Q. Haven't you as high as 100 feet up there at some points?

A. No, sir, no place this side the car shops.

Q. If you were shipping freight from the west side division across the Oswego cut-off, that is, freight that was going on through  
774 to the East, you would run it on into the Terminal yards, or if it was going on the O. R. & N. would you transfer to East Portland?

A. I would transfer to East Portland. That is, I will qualify that. I will say if it was going East over the O. R. & N. If going East over the N. P., it would be brought over to the Portland Terminal.

Q. What road is that that is digging a tunnel down on the peninsula?

A. Oregon and Washington.

Q. That will go in on the East side too, will it not?

A. That is my understanding.

Redirect examination.

Questions by Mr. FENTON:

— The Oregon and Washington is the corporation building by the Harriman interests from Portland to Seattle?

A. Yes, sir.

Q. And that tunnel referred to is the tunnel to go through the peninsula to the bridge across the Columbia River, is it?

A. Yes, sir, to the bridge of the Spokane, Portland & Seattle.

Q. Where does this tunnel come out, with reference to the Willamette River?

A. This side of St. John; that is North—or Rather South of St. John.

Q. At that point it will intersect with the Troutdale extension of the O. R. & N.?

A. Yes, sir.

775 Q. This won't come into the city?

A. Through the O. R. N. through Albina.

Q. Over the new bridge?

A. Over the new bridge.

Q. That bridge will be where?

A. At Oregon Street on the east side.

Q. Where on the west side?

A. Glisan Street on the west side; Glisan and Third.

Q. And where with reference to the north end of Fourth Street?

A. Well, it will—I will say at Glisan Street, the upper approach will end at Glisan Street, the Portland side, but the lower approach will come in about the end of Third Street—foot of Third Street, near where the Northern Pacific Terminal Company's roundhouse is at the present time.

Q. On the grounds of the Northern Pacific Terminal Company?

A. On the grounds of the Northern Pacific Terminal Company.

Q. And meet the traffic that comes by Fourth Street on those grounds?

A. Yes, sir.

Witness excused.

776 Mr. FENTON: I offer the title page of the revised ordinances of the City of Portland, Oregon, published January, 1905, which reads as follows:

"The general ordinances of the City of Portland, Oregon, in force January 2, 1905, compiled and arranged by Thomas C. Devlin, Auditor of the City of Portland, Oregon, by authority of the Common Council of the City of Portland, Oregon, 1905."

Mr. KAVANAUGH: I object to the title page. It amounts to nothing.

Mr. FENTON: You do not question this is the official compilation of the City of Portland?

Mr. KAVANAUGH: I know there are mistakes in there. It was made under order and never approved except by the Auditor himself. I know of a great many errors in it.

Mr. FENTON: I am not offering it to show errors. I am offering it to show authorization.

Mr. KAVANAUGH: I understand it never was adopted. He was simply authorized to compile them and he did compile them. I may be mistaken about it.

Mr. FENTON: Well, I will offer it for what it is worth.

COURT: Very well, for what it is worth.

Marked Complainant's Exhibit "MM".

777 Mr. FENTON: I offer Ordinance No. 183, found at pages 23 and 24 of this compilation, and I want to offer this for the purpose of showing how the City of Portland, by its officials, have treated this franchise, and I offer particularly these words: "Franchise owned by the Oregon and California Railroad Company, leased by the Southern Pacific Company."

Mr. KAVANAUGH: I object to that because I know that part was not authorized.

The COURT: You mean not in the Ordinance?

Mr. KAVANAUGH: Not in the original ordinance.

The COURT: Very well.

Mr. FENTON: I offer the original, and certified copy of that Ordinance, and ask time to submit.

Ordinance No. 183, marked Complainant's Exhibit "NN".

778

*Ordinance No. 183.*

*(Former City of East Portland.)*

*(Franchise Owned by the Oregon & California Railroad Company,  
Leased by the Southern Pacific Company.)*

*An Ordinance Granting to the Oregon and California Railroad  
Company the Right of Way on First Street.*

*(Preamble.)*

Whereas, by the consent and approbation of the Board of Trustees of the City of East Portland, the Oregon and California Railroad Company has heretofore, at large cost and expense, graded and erected a roadbed and trackway upon which to lay the rails for and to operate its line of railroad within, upon, and along First Street, in said city, from the center line of "A" street to the center line of "V" street, and thence crossing certain streets in said city, to the boundary line thereof on the south, with the expectation on the part of the officers of said railroad company, induced by the Board of Trustees of said city, that said privilege, upon proper terms and conditions, would be perpetuated by said city, to said railroad company; now, therefore,

The City of East Portland does ordain as follows:

*(Franchise—Conditions of.)*

SECTION 1. The Oregon and California Railroad Company is hereby authorized and permitted to continue, construct, maintain, use, improve, and keep in repair its railroad track upon, and to occupy for the purpose of its said railroad track, so much of said First Street in the city of East Portland, between the center line of "A" Street and the north line of "J" Street, as shall be necessary

and sufficient to place, maintain upon and use three parallel railroad tracks in the same manner as such tracks are now constructed and used upon a portion of said First street; and the said Oregon and California Railroad Company is hereby authorized and permitted to continue to use all that portion of First street between the North line of "J" street and the south line of "V" street, in said City of East Portland, for its railroad track as hereinafter mentioned; and to construct, maintain, keep in repair, and use for railroad purposes, two parallel railroad tracks over all said last mentioned portion of First street, and to occupy and use so much of said First street as shall be necessary for that purpose; but said railroad track shall not occupy a space of more than twenty feet in width along said street, which shall be included between two lines ten feet on either side from the center line thereof; and also, to continue, maintain, keep in repair, and use its railroad for railroad purposes across any and all streets in said city over which the same is now constructed between said "V" street and the south boundary line of the city.

(Company to Improve When Ordered by City—What.)

SECTION 2. All alterations of grades of streets required for laying said railroad track, and all improvements and repairs of the same for said purpose, shall be made at the expense of said railroad company, and the same shall be made as may be provided by ordinance and whenever any of said streets, any portion of which shall be used or occupied by said railroad company under this Ordinance for its railroad track, shall be ordered improved by the said city by laying plank roadway for the full width of such street, and laying sidewalks in the manner provided in its charter, the said railroad company shall improve and thereafter maintain in repair in the manner provided for the improvement of such streets, and at its own expense, so much thereof as shall be embraced between its said track and the outside ends of the ties of its roadbed.

780 Change of Grade of Roadbed to be at Expense of Company.

And in case the grade of any of such streets shall be hereafter changed by said city in the manner provided in its charter, the grade of the road of said company shall be changed by said company at its own expense, to conform to such changed grade.

Rate of Speed.

SECTION 3. The said railroad company shall not run its locomotives or railway cars upon or over any such streets at a greater speed than ten miles an hour.

Passed June 17, 1876.

A. J. HOYT,  
President of the Board of Trustees  
of the City of East Portland.



781 Mr. FENTON: I offer Ordinance No. 599, as printed on pages 24 and 25 of this volume, and particularly these words: "Railroad franchise owned by The Oregon and California Railroad Company, leased by the Southern Pacific Company". And I ask leave, Your Honor, to submit a certified copy of the original ordinance as first presented, if I can find it. Mr. Goutz is now looking for this, 599.

Ordinance No. 599, marked Complainant's Exhibit "OO".

782 Mr. FENTON: I offer in evidence Ordinance No. 3656, with reference to tracks in the North part of the City in connection with the Northern Pacific Terminal Company and the Oregon and California Railroad Company.

Marked Complainant's Exhibit "PP".

783

*Ordinance No. 3656.*

(Railroad Franchise Owned by The Northern Pacific Terminal Company.)

An Ordinance authorizing the Northern Pacific Terminal Company of Oregon, its successors and assigns, to construct and maintain a double railway track in North Front Street, in the City of Portland, from the northern limits of said city to the south line of P street, and a single track from thence to a point opposite the southwest corner of block G and eighty feet distant therefrom with a side track from a point opposite block 220 to Block H, both in Couch's Addition to said City of Portland; also sufficient and suitable side tracks from, at or near the foot of P street curving across and along East and West Park streets and M, N, O and P streets, and to confirm to the Oregon and California Railway Company the right to maintain and operate its main and side tracks in north Front Street in said City.

The City of Portland does ordain as follows:

(Franchise-Route.)

SECTION 1. The Northern Pacific Terminal Company of Oregon, its successors or assigns are hereby authorized and permitted to construct and maintain a double railroad track along north Front street in the City of Portland the center line of each track to be located seven (7) feet from and on either side of the center line of said street from the northern boundary line of said city to a point of intersection with the south line of P street in Couch's addition to said city, produced and a single track from thence to a point opposite

784 the southeast corner of Block G in said Couch's Addition with its center eighty feet in an easterly direction therefrom.

And also a side track from a point in said main track opposite the southeast corner of fractional block 222 in said Couch's Addition to a point at or near the northwest corner of fractional Block

H in said Couch's Addition, with a branch track from a point in said side track near the southeast corner of Block 221 in said Couch's Addition to a point in the west line of said block H about forty feet from the northwest corner thereof.

And also the right to construct and maintain sufficient and suitable side tracks, branches and turnouts, branching off from said double track in North Front Street between the West line of North Eighth Street extended, and the west line of east Park Street extended, thence along and across East Park Street and West Park Street and "M", "N", "O" and "P" Streets as nearly as practicable as said main and side tracks are now shown and designated upon an annexed map or plat by red lines, which plat is made a part hereof and to run locomotives and cars over the same upon the terms and conditions herein provided.

The Northern Pacific Terminal Company, in the exercise of the rights and privileges hereby granted shall not construct any of its main or side tracks in or along North Front Street East of the East line of East Park Street extended, unless, or until it shall have agreed with the Oregon and California Railway Company for the purchase or leasing of the property of said Oregon and California Railroad Company, situate on either side of said Front Street for terminal purposes and for the occupation and use by the said Oregon and California Railroad Company in common with other railroad and transportation companies of the terminal facilities

785 to be provided by the said Northern Pacific Terminal Company. And the said Oregon and California Railroad Company, its successors and assigns, is hereby authorized to maintain and operate for the purpose of a railroad operated by steam, its main and side tracks as now located, constructed, and used in said North Front Street until such time as the Northern Pacific Terminal Company shall have constructed and completed its terminal buildings and railroad tracks, and shall have by agreement with the said Oregon and California Railroad Company extended its tracks upon North Front Street south of the East Line of East Park Street.

The right hereby granted may be exercised and said tracks, branches, turn-outs, and side tracks may be constructed and maintained by the said Northern Pacific Terminal Company, its successors and assigns, for the use of the Northern Pacific Railroad Company, the Oregon Railway and Navigation Company, the Oregon and California Railroad Company, the Oregon Improvement Company, the Oregon and Transcontinental Company, the Oregonian Railway Company, Ltd., the Pacific Coast Steamship Company, and any other Railroad or transportation companies to whom the right to use the terminal buildings and facilities may be leased by the Northern Pacific Terminal Company.

(Company to Improve—What.)

SECTION 2. The said Northern Pacific Terminal Company shall grade to the established grades, construct, and maintain in good repair the following enumerated portions of said streets so occupied:

First, between its double tracks from the northern boundary of the city limits to the south boundary line of P Street extended.

786 Second, between the rails of all its main and side tracks and branches.

Third, at least two feet in width upon each side of the outer rail of all its main, side tracks, and branches. And shall do and perform such work and improvement and repair of said portions of said street in such manner and as often as the Common Council of the City of Portland may provide for or require.

(Alterations at Expense of Company.)

SECTION 3. Alterations of grades of streets required for laying the said railway tracks and all improvements and repairs of the same for said purpose, shall be made at the expense of said Northern Pacific Terminal Company, and the same shall be made as shall be provided by ordinance.

(Rate of Speed.)

SECTION 4. The Common Council of the City of Portland reserves the right to regulate by ordinance the rate of speed at which locomotives and trains may be run upon said track.

Passed the common Council December 6, 1882.

Approved December 8, 1882.

J. A. CHAPMAN, *Mayor*.

787 Mr. FENTON: I offer Ordinance No. 8099, in favor of the Oregon & California Railroad Company for the side track on Fourth Street.

Mr. KAVANAUGH: Objected to as immaterial.

Objection overruled; exception saved.

Ordinance No. 8099 marked Complainant's Ex. QQ.

*Ordinance No. 8099.*

An Ordinance Authorizing the Oregon & California Railroad Company to Place a Side Track on Fourth Street, in the City of Portland, for the Accommodation of the Union Meat Company.

The City of Portland does ordain as follows:

Franchise—Routes.

Sec. 1. That the right and privilege is hereby granted to the Oregon and California Railroad Company, a corporation duly organized and existing under and by virtue of the laws of the State of Oregon to lay, maintain and operate a sidetrack of standard gauge to connect with the main track of the said Oregon and California

Railroad Company at a point about ten (10) feet north of the north line of Hoyt street, branching off from said point toward the west or south of the center line of Fourth Street, and running by curves customary for railroad sidetracks until it reaches a point twenty-three (23) feet west of the center line of the said Fourth Street in front of Block P in Couch's Addition to the City of Portland, and running thence south along said Fourth Street and twenty-three (23) feet west of said center line of Fourth Street until it reaches the north line of Glisan Street. Said track shall be laid and maintained flush with the established grade of said Fourth street.

#### Operation of Cars—Under Control of City.

SEC. 2. The operation of cars over the track hereinbefore provided shall be under the direction of the Committee on Streets and the Superintendent of Streets of said city of Portland and said City of Portland reserves the right to cause the said Oregon and California Railroad Company to remove said track and place the street in as good condition as it was at the time before said track was built when the Common Council shall so order.

#### Acceptance.

SEC. 3. A written acceptance of the terms of this ordinance and an agreement coupled therewith to remove at its own expense all said tracks when required by said Common Council shall be filed by the said Oregon and California Railroad Company with the Auditor and Clerk of said City before laying any track mentioned in this ordinance and within thirty (30) days after the approval thereof.

#### Street Improvements—To Make.

SEC. 4. The said railroad company shall grade to the established grade and plank, pave or macadamize and maintain in good repair that portion of the street or sidewalk occupied by said track at least six (6) feet each side of the center line thereof, and shall do and perform said work and the improvement and the repair thereof in such manner and as often as the Common Council of the city of Portland may at any time provide for or require.

789

#### Forfeiture.

SEC. 5. The failure to lay the track hereinbefore provided for within six (6) months from the date of the passage of this ordinance shall at once and without any act of said city work a forfeiture of all rights and privileges conferred by this ordinance.

Approved January 5th, 1893.

790

Mr. FENTON: I Offer Ordinance No. 13183, Oregon and California Railroad Company, with reference to side track on Fourth Street, and ask leave to put in certified copy.

## Ordinance 13183 marked Complainant's Exhibit "RR."

791 Mr. KAVANAUGH: To all of this I would like to offer a separate objection to each one on the ground that this is not rebuttal testimony. It should have been testimony in chief before we closed the case. It should have been testimony that we could meet.

Mr. FENTON: Then I ask leave that it may be offered in chief.

Mr. KAVANAUGH: Will we be permitted to rebut that testimony?

The COURT: Yes, sir.

Mr. KAVANAUGH: And further, on the ground that it is immaterial.

The COURT: I understand that all this record goes in under your objection as immaterial.

Mr. FENTON: I will offer Section Four of the explanatory note in the Charter of the City of Portland—preceding the Charter of the City of Portland now in effect. What is the date of that, Mr. Kavanaugh?

Mr. KAVANAUGH: January 23, '03, that is the previous charter. That forms no part of the Charter, it was eliminated.

Mr. FENTON: This was submitted to the voters and that is what they voted on.

Mr. KAVANAUGH: They didn't vote on the foreword. They voted on the Charter. That is not in the original Charter.

792 Mr. FENTON: It accompanied it when submitted.

I offer it as a part of the history of the adoption of this Charter. Section 4.

Marked Complainant's Exhibit "SS."

*Section Four of the Explanatory Note.*

"4. To Regulate the power to grant franchises and to provide for the acquirement by the city of Public Utilities.

In the past, Portland, like all cities of the United States, has lightly valued its rights and privileges. The proposed charter provides that in future no franchise shall be granted for more than 25 years now without a fair compensation to the city. In Addition should the people so demand at an election held for that purpose and with careful limitations upon increase of indebtedness, the city may assume any public utility; i. e., to take over lighting plants, telephone systems, street railways and the like."

By Mr. FENTON: I offer what appears under franchises in the parallel columns on page 10, which reads:

Marked Complainant's Exhibit "TT."

"Franchises.

No restrictions on Council's Powers to grant any kind of a franchise for any length of time.



## "Franchises.

Council cannot grant a franchise for more than 25 years, nor without fair compensation to the city. Before its final passage, an ordinance granting a franchise must be published at the expense of the applicant in the city official newspaper, and must receive the affirmative vote of two-thirds of council to become valid. Sections 93 to 112."

793 Mr. FENTON: I offer Section 7, Liability under previous contracts: "All contracts of every description heretofore duly and legally made and entered into by the said City of Portland shall remain valid and be binding upon this municipality to the extent only that they are now valid and binding upon said City of Portland."

Mr. KAVANAUGH: It is pleaded in your complaint.

Mr. FENTON: I am introducing this to get it into the record.

Mr. KAVANAUGH: This is the general law, and the Court takes judicial knowledge.

Mr. FENTON: There is some question about that.

Court: Let him read it into the record, and there will be no question.

Section 7 of Charter Marked Complainant's Exhibit "UU."

Mr. FENTON: I will offer Section 95. This is a long section, and I will ask the Reporter to make it.

Section 95 of the Charter marked Complainant's Exhibit "VV."

"SEC. 95. No franchise, lease or right to use the water front, ferries, wharf property, land under water, public landings, wharves, docks, highways, bridges, avenues, streets, alleys, lanes, parks or any other public place, either on, through, across, under or over the same, nor other franchise, shall be granted by the city to any private corporation, association or individual except as in this Charter otherwise provided, for a longer period than twenty-five (25) years,

794 nor without fair compensation to the city therefor, and in addition to the other forms of compensation to be therein provided the grantee may be required to pay annually to the city such percentage of the gross receipts arising from the use of such franchise and of the plant used therewith as may be fixed in the grant of said franchise. Every grant of a franchise shall fix the amount and manner of the payment of the compensation to be paid by the grantee for the use of the same and no other compensation of any kind shall be exacted for such use during the life of the franchise, but this provision shall not exempt the grantee from any lawful taxation upon his or its property, nor from any licenses, charges or impositions not levied on account of such use. Every grant of a franchise or right and every contract therefor made or granted under the provisions of this Charter shall provide that at the expiration of the term or period for which it is made or granted the city at its election and upon the payment therefor of a fair valuation thereof to be made in the manner provided for therefor in the grant or contract may purchase and take over to itself the property



and plant of the grantee in its entirety and which may be situated on, in, above or under the streets and public places aforesaid or any thereof and used in connection therewith, but in no case shall the value of the franchise of the grantee be considered or taken into account in fixing such valuation or such grant and contract in pursuance thereof may provide that upon the termination of said franchise, or right, granted by the city, the plant as well as the property, if any, of the grantee situated on, in, above or under the public places aforesaid and used in connection therewith shall thereupon be and become the property of the city without any compensation to the grantee, upon an ordinance duly enacted authorizing the same and upon its paying to the grantee said valuation; provided, however, that before the city shall have authority to take over such plant or property, the question whether or not the city shall acquire or take such plant and property shall first be submitted to the voters of the city in accordance with and subject to the foregoing limitations of this Article; and provided further, that the question whether or not the city shall acquire or take such plant or property must be submitted to the voters of the city as above provided without such ordinance, whenever a petition shall be filed with the Council subscribed by a number of electors of the city equal to 15 per centum of the votes cast at the last preceding election, asking that such question shall be submitted for approval or rejection to the vote of the people. Such ordinance must be passed or such petition filed within one year prior to the expiration of such grant or franchise and within a sufficient time before the expiration of such year so that if a special election is required to be held to pass upon such question, the same can be held within six months prior to such expiration. Such petition shall be sufficient if it conforms to the requirements of sections 53 and 54 of this Charter as to the petition therein provided for. Every grant reserving to the city the right to acquire the plant as well as the property, if any, of the grantee situated in, on, above or under the streets, avenues, or other public places of the city shall in terms specify the method of arriving at the valuation therein provided for and shall further provide that upon the payment by the city of such valuation the plant and property so valued, purchased and paid for shall become the property of the city by virtue of the grant and payment thereunder and without the execution of any instruments of conveyance and every such grant shall make adequate provision by way of forfeiture of the grant, or otherwise, for the effectual securing of efficient service and for the continued maintenance of the property in good order and repair throughout the entire term of the grant; but the terms of this section so far as they relate to the acquisition of the plant, property and business of the grantee shall not apply to the rights given railroads under sections 102 and 103 of this Charter."

Mr. FENTON: I think the others are pleaded, Your Honor; it is offered for the respective purpose of showing the difference between the present charter and the State Law in effect at the time Ordinance No. 599 was passed.

That is all, Your Honor, excepting the introduction of that map by the City Engineer which may have to be identified.

Mr. KAVANAUGH: Does Your Honor believe there is any question about the Court taking judicial notice of the provisions of the charter?

The COURT: I do not know what the rule is on the subject.

Mr. KAVANAUGH: If there is any doubt, I would like to introduce some provisions here that we want to rely upon.

Mr. FENTON: The only question is in preserving the record for appeal; we have it in the record.

797 Mr. KAVANAUGH: I will introduce Section 73, Subdivisions one and two.

Section 73 of the Charter of the City of Portland, marked Defendant's Exhibit No. 8.

"SECTION 73. The Council has power and authority, subject to the provisions, limitations and restrictions in this Charter contained:

1. To exercise within the limits of the City of Portland all the powers commonly known as the police power to the same extent as the State of Oregon has or could exercise said power within said limits.

2. To make and enforce within the limits of the city all necessary water, local, police and sanitary laws and regulations."

Mr. KAVANAUGH: I will introduce Section 74.

Section 74 of the Charter of the City of Portland, marked Defendant's Exhibit No. 9.

"SECTION 74. The foregoing or other enumeration of particular powers granted to the Council in this Charter shall not be construed to impair any general grant of power herein contained nor to limit any such general grant to powers of the same class or classes as those so enumerated."

Mr. KAVANAUGH: Ordinance No. 599 is in.

798 Mr. FENTON: Yes, that is in with this difference, Mr. Kavanaugh. I am trying to find the original ordinance and the original record of the ordinance for the purpose of determining whether they are exactly as printed in this book.

Mr. KAVANAUGH: There may be a few more sections and Mr. Fenton may have a few more.

The COURT: We will leave the record open and you can read into it whatever you want.

Mr. FENTON: I offer the Act of Congress of May 4, 1870.

Marked Complainant's Exhibit "WW."

799 An Act Granting Lands to Aid in the Construction of a Railroad and Telegraph Line from Portland to Astoria and McMinnville, in the State of Oregon.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress Assembled, That for the

purpose of aiding in the construction of a railroad and telegraph line from Portland to Astoria, and from a suitable point of junction near Forest Grove to the Yamhill River, near McMinnville, in the State of Oregon, there is hereby granted to the Oregon Central Railroad Company, now engaged in constructing the said road, and to their successors and assigns, the right of way through the public lands of the width of one hundred feet on each side of said road, and the right to take from the adjacent public lands materials for constructing said road, and also the necessary lands for depots, stations, side tracks, and other needful uses in operating the road, not exceeding forty acres at any one place; and, also, each alternate section of the public lands, not mineral, excepting coal or iron lands, designated by odd numbers nearest to said road, to the amount of ten such alternate sections per mile, on each side thereof, not otherwise disposed of or reserved or held by valid pre-emption of homestead right at the time of the passage of this act. And in case the quantity of ten full sections per mile cannot be found on each side of said road, within the said limits of twenty miles, other lands designated as aforesaid shall be selected under the direction of the Secretary of the Interior on either side of any part of said road nearest to and not more than twenty-five miles from the track of said road to make up such deficiency.

SEC. 2. And be it further enacted, That the Commissioner  
800 of the general land office shall cause the lands along the line of the said railroad to be surveyed with all convenient speed. And whenever and as often as the said company shall file with the Secretary of the Interior maps of the survey and location of twenty or more miles of said road, the said Secretary shall cause the said granted lands adjacent to and coterminous with such located sections of road to be segregated from the public lands; and thereafter the remaining public lands, subject to sale within the limits of the said grant, shall be disposed of only to actual settlers at double the minimum price for such lands: And provided also, That settlers under the provisions of the homestead act who comply with the terms and requirements of said act, shall be entitled within the said limits of twenty miles, to patents for an amount not exceeding eighty acres each of the said ungranted lands, anything in this act to the contrary notwithstanding.

SEC. 3. And be it further enacted That whenever and as often as the said company shall complete and equip twenty or more consecutive miles of the said railroad and telegraph, the Secretary of the Interior shall cause the same to be examined, at the expense of the company, by three commissioners appointed by him; and if they shall report that such completed section is a first-class railroad and telegraph, properly equipped and ready for use, he shall cause patents to be issued to the company for so much of the said granted lands as shall be adjacent to and coterminous with the said completed (completed) sections.

SEC. 4. And be it further enacted, That the said alternate sections of land granted by this act, excepting only such as are neces-

801 sary for the company to reserve for depots, stations, side tracks, wood yards, standing ground, and other needful uses in operating the road, shall be sold by the company only to actual settlers, in quantities not exceeding one hundred and sixty acres or a quarter section to any one settler, and at prices not exceeding two dollars and fifty cents per acre.

SEC. 5. And be it further enacted, That the said company shall, by mortgage or deed of trust to two or more trustees, appropriate and set apart all the net proceeds of the sales of the said granted lands, as a sinking fund, to be kept invested in the bonds of the United States, or other safe and more productive securities, for the purchase from time to time, and the redemption at maturity, of the first mortgage construction bonds of the company, on the road depots, stations, side-tracks, and wood yards, not exceeding thirty thousand dollars per mile of road, payable in gold coin not longer than thirty years from date, with interest payable semiannually in coin not exceeding the (rate) of seven per centum per annum; and no part of the principal or interest of the said fund shall be applied to any other use until all the said bonds shall have been purchased or redeemed and cancelled; and each of the said first mortgage bonds shall bear the certificate of the trustees, setting forth the manner in which the same is secured and its payment provided for. And the District Court of the United States, concurrently with the State courts shall have original jurisdiction, subject to appeal and writ of error, to enforce the provisions of this section.

802 SEC. 6. And be it further enacted, That the said company shall file with the Secretary of the Interior its assent to this act within one year from the time of its passage; and the foregoing grant is upon condition that said company shall complete a section of twenty or more miles of said railroad and telegraph within two years, and the entire railroad and telegraph within six years, from the same date.

Approved, May 4, 1870.

803 F. COOPER resumed the stand on behalf Complainant.

Direct examination.

Questions by Mr. FENTON:

— What number of cars of the Portland Railway Light and Power Company move daily along East First and Morrison Streets in this city at the present time?

A. 1796.

Q. Does that include—1796,—what traffic does that include?

A. Well, that takes in all the lines operating over the Morrison Street Bridge, Mount Tabor, Sunnyside, Montavilla and East Ankeny, Woodstock, Brooklyn and the O. W. P. Transfer cars.

Q. And Richmond also?

A. Yes, Woodstock and Richmond.

Q. What is the traffic across the Burnside Street Bridge—crossing per day?

A. 1020.

Q. 1020?

A. 1020.

Q. What is the traffic over the steel bridge?

A. That is the steel bridge I gave you.

Q. I said Burnside.

A. Burnside is 950.

Q. Now, what lines supply that traffic over Burnside?

A. Over Burnside Bridge? Vancouver, Woodlawn, Alberta, Broadway and East Burnside Street.

Q. Now, what is the traffic over the steel bridge per day?

A. 1020.

804 Q. Where does that traffic come from?

A. St. Johns, Williams Avenue, Mississippi Avenue, and Irvington.

Q. Does any of this traffic that crosses over the Morrison Street Bridge, the Burnside Street Bridge and the Steel Bridge pass in cars over Fourth Street, and if so, at what points and about what per cent. of it?

A. On what? Give me the question again.

(Question read.)

A. Over Burnside and Morrison, yes; over the steel bridge, no.

Q. Now what percentage of the traffic over the Burnside passes over Fourth Street in cars?

A. Well, there are 645 cars per day that pass over Fourth and Burnside.

Q. Out of this traffic?

A. Out of this traffic.

Q. And what per cent. of the traffic over the Morrison Street Bridge passes over Fourth and Morrison?

A. Over Morrison Bridge? 236.

Q. The total of that traffic over the Morrison Street Bridge was how much?

A. Morrison Street Bridge is 1796.

Q. And 236 cars of that passed over Fourth Street?

A. Yes, the Mount Tabor cars only.

The COURT: Mr. Cooper, do you say that 645 cars that pass over the Burnside Bridge continue on over Fourth Street?

A. Yes, sir.

The COURT: All the cars that pass over Burnside Bridge  
805 then, go across Fourth Street.

Q. Don't some go up First and Second?

A. Go up to Fourth Street. They only go one way; at Fourth and Burnside Street.

Mr. KAVANAUGH: Across Fourth Street, Mr. Cooper?

A. Yes, once at Washington and once at Fourth. While Burnside Bridge crossings are 950, 645 of these cars cross at Fourth and Burnside.

COURT: When you were on the stand before, you said 645 cars cross Fourth and Burnside. These are the cars that go over Burnside Bridge and go back?

A. Yes.

Mr. FENTON: Yes, loaded.

Q. Yes, some cars come loaded at Fourth and Washington going west and turn at Fourth and Washington going east empty?

A. Going empty in the morning and empty at night.

Q. Do you include that 645 in the number you say cross Washington Street?

A. No.

Q. 1700 cars cross Washington Street, Fourth and Washington?

A. Other lines are included in that.

COURT: You said on the first statement 1105 cars.

A. Fourth and Washington—

27 Vancouver

148 Woodlawn

145 Alberta

806 85 Broadway,

70 St. John,

20 Union Avenue

360 Twenty-third Street

250 Portland Heights.

These are the cars crossing going either or in any direction.

Mr. KAVANAUGH: What cars cross Burnside Bridge that do not cross Fourth Street?

A. What cars cross Burnside Bridge that do not cross Fourth Street?

Q. Yes.

A. Not any.

Mr. KAVANAUGH: It seems to me you gave the number crossing Burnside as higher than crossing Fourth. Didn't you say 900 Burnside and 600 crossing Fourth?

A. 950 Burnside Bridge.

Q. How many cross Fourth Street?

A. 645.

Q. Don't they all cross?

A. Those crossing Burnside is going both ways—Fourth and Burnside is only going one way.

Mr. FENTON: They cross Fourth too?

A. You have to change that at Fourth and Washington; they are included going back on Fourth and Washington.

Q. Every car that crosses Burnside Street Bridge crosses Fourth Street as many times as it crosses the bridge.

Witness excused.

807 PORTLAND, OREGON, FRIDAY, December 24/'09—

10 o'clock a. m.

S. GRUTZE recalled on behalf of plaintiff.

Questions by Mr. FENTON:

— I show you certified copy of bill of Schwab Brothers, for \$982.00, rendered April 17, 1902, against the City of Portland, which may be identified as Plaintiff's Exhibit XX, and ask you if that bill was audited and paid by the City of Portland, and to what



it related. What it covered with reference to the Charter of the City of Portland, and the foreword, the explanatory note, which was submitted to be voted on at the election in June, 1902.

A. This is a bill for 10,000 copies of the proposed charter; Original Bid, \$750.00; additional pages and resetting two-thirds of charter (including index), headlines, etc., \$232.00, making a total of \$982.00 which was O-Ked by Sanderson Reed, Clerk, approved by R. L. Glisan, H. W. Hogue and Richard W. Montague, Charter Board Committee.

Q. Was it paid?

A. The bill was paid, yes, sir. It was paid by warrant drawn against the City of Portland; ordered paid by the Council and paid by warrant.

Q. I show you the proposed Charter of the City of Portland, approved by the Charter Board, and to be voted on at the election in June, 1902, which may be identified as Plaintiff's Exhibit YY, and ask you if that is the charter, 10,000 copies of which were ordered printed and paid for.

808

A. Yes, sir, it is.

Mr. FENTON: I offer in evidence both exhibits.

Mr. KAVANAUGH: I object; to the bill first as being utterly immaterial, incompetent and irrelevant, and having no relation to the issues; also to the offer of the proposed charter, I object to the admission of the proposed charter for the reason that it is not the same as the charter of the city of Portland, contains matter which is not contained in the charter as passed by the Legislative Assembly, and consequently is immaterial, incompetent and irrelevant.

Objection overruled; exception saved.

Schwab Bros. Bill marked Plaintiff's Exhibit XX.

Proposed Charter marked Plaintiff's Exhibit YY.

Q. Do you know if this is the document—plaintiff's exhibit YY—that was circulated before that election—one of the 10,000 that was circulated?

A. This is; yes, sir, this is one.

Cross-examination.

Questions by Mr. KAVANAUGH:

— Mr. Grutze, do you know whether this sample that you have examined is the same in all respects, including the foreword and preface as the Act of the Legislative Assembly which constitutes the present charter of the City of Portland?

A. I do not. I have never examined them.

Q. Do you know that the foreword is not a part of the charter, as passed by the Legislature?

A. That has been my understanding.

Mr. FENTON: Otherwise it is the same?

Mr. KAVANAUGH: I am not quite sure; have heard there were differences.

809

## Redirect examination:

Q. With the exception of the foreword, it is the same, isn't it?

A. Yes, sir.

Witness excused.

810 SANDERSON REED, a witness called on behalf of the plaintiff, being first duly sworn, testified as follows:

## Direct examination.

## Questions by Mr. FENTON:

— Mr. Reed, you were Secretary of the Charter Board that prepared and submitted to the vote of the people, the present Charter, of the City of Portland, were you not?

A. Yes, Clerk.

Q. Clerk. I show you Plaintiff's Exhibit YY, and will ask you if that is the document that was submitted to be voted on at the election in June, 1902, and adopted by the Charter Board.

A. The charter was voted on and was adopted with the exception of the last clause. Well, it was adopted as it was printed, yes. The Legislature changed the last clause.

Q. The last section?

A. Made it an emergency bill, if my recollection is right.

Q. Yes, this—What is the fact as to your submitting this to the printer to be printed the same in form in which it is here, including the explanatory note or foreword?

A. The explanatory note or foreword—

Mr. KAVANAUGH: Same objection.

A. —was passed in to me as Clerk with the rest of the Charter, and was printed as emanating from the same sources, and with the Charter, if my recollection is right, and I think it is.

Q. Then the Charter Board adopted this as it is?

811 A. Adopted it as it is, and paid for it in the last minutes by an order.

## Cross-examination.

## Questions by Mr. KAVANAUGH:

— Do you know, Mr. Reed, whether the Charter Board ever adopted or formally approved the foreword?

A. I can't remember that far back; as far as memory is concerned, but I am absolutely—

Q. You know they adopted the rest of the Charter?

A. I was going to say I was absolutely sure, or I never would have had it printed, could not have been printed without being absolutely known to and a part of the act of the Charter Board.

Q. Who prepared that foreword?

A. I think Mr. Mills did, and Joe Teal.

Q. It was not the action of the whole board?

A. I think it was. It was just as much the action of the whole Board as any part of the Charter was the action of the whole Board. The Charter Board was composed of a number of sub-committees, and a Revision Committee, and the sub-committee did their work, and what they did not do, the Revision Committee did, and it was adopted by the Board. This was a sub-committee's work, I think.

Q. What was it intended for?

A. Beg Pardon?

Q. What was it intended for?

A. Well, it was intended to elucidate the situation.

Q. As an argument in favor of the adoption of the Charter?

A. I think it was, yes.

Witness excused.

812 S. GRUTZE recalled by plaintiff.

Questions by Mr. FENTON:

— Have you the Journal that was kept by the Charter Commission?

A. Yes, sir.

Q. Kept by Mr. Reed?

A. Yes, sir.

Q. The Secretary?

A. Yes, sir.

Q. I wish you would turn to the entry ordering this Charter to be printed, these 10,000 to be printed, and read that, Mr. Grutze.

A. This appears to be under an adjourned meeting of the Charter Board of the City of Portland, held in the Council Chamber on February 14, 1902, at 8 o'clock p. m. Among other things appears the following:—"Mr. Teal moved that the Charter be published in pamphlet form and that 10,000 copies be printed, which motion was seconded and carried."

Q. Those minutes were signed by Mr. Reed?

A. "Thereupon the meeting adjourned. Sanderson Reed, Clerk."

Q. You know Mr. Reed's signature?

A. Yes, sir.

Mr. FENTON: I offer that entry which witness has read, to show the authority to publish.

Mr. KAVANAUGH: Objected to as immaterial, incompetent and irrelevant.

Objection over-ruled; exception saved.

Marked Plaintiff's Exhibit ZZ.

Witness excused.

813 Mr. FENTON: If the Court please, I have one ordinance here which I wish to offer as tending to show contemporaneous construction on the part of the Council that passed the ordinance under consideration, No. 599—ordinance No. 568, and I have the Revised Ordinances of the City of Portland January, 1905, and if there is no objection on the part of the counsel, I should like to have

the ordinance read into the record, without the expense and trouble of getting a certified copy.

Mr. KAVANAUGH: I think they are proper in the book. I think they are authentic. Of course I object to the introduction of the ordinance as immaterial, but not to the authenticity.

Ordinance No. 568 marked Plaintiff's Ex. AAA.

814

## COMPLAINANT'S EXHIBIT AAA.

*Ordinance No. 568*

An Ordinance Granting Permission to James B. Stevens and Walter Moffett to construct a Wharf Adjoining Lot No. One (1), Block No. Seventy-two (72), and the South Half of Lot No. Four (4), in Block No. Seventy-three (73) in the City of Portland, and to Grade and Plank so Much of that Portion of Main Street Lying East of the East Line of Front Street as May be Necessary for a Convenient Passage to and from the Wharf.

The City of Portland Does Ordain as Follows:

SEC. 1. That James B. Stevens and Walter Moffett have the authority and consent of the Common Council to construct a wharf adjoining on the east Lot One (1) in Block Seventy-two (72) and the South Half of Lot Four (4) in Block Seventy-three (73) in such manner that the same shall not unnecessarily interfere with the navigation of the Willamette River adjacent thereto.

SEC. 2. That said Stevens and Moffett have the authority and the consent of the Common Council to grade and plank so much of that portion of Main Street lying east of the east line of Front Street as may be necessary for a convenient passage to and from the wharf.

SEC. 3. That said parties shall in all respects comply with the directions of the Committee on Streets and Public Property and the Street Commissioner in the construction of said wharf, grading and planking and at all times comply with such regulation as the Common Council may prescribe governing wharves.

815 SEC. 4. The authority, consent and privilege hereby granted to remain only during the pleasure of the Common Council.

Approved October 10, 1868.

816 Mr. FENTON: I also offer Ordinance No. 619 of the compilation of 1884. Also No. 1065. I don't wish to offer all of these ordinances, because it will unnecessarily encumber the records, but I want to offer such of them here as I think are relevant and material, for the purpose of getting contemporaneous construction, and I will give counsel a list of the ordinances and ask leave to read such portion of them into the record as may be material. I have a list here. These are for the purpose of showing, your Honor, that under the various charters of the City of Portland, the council at times granted limited franchises, and at other times granted franchises without limit, and at other times, granted to street railways thirty year franchises.

Mr. KAVANAUGH: These do not relate to this company?

Mr. FENTON: Some do, and some do not.

Mr. KAVANAUGH: All subject to the same objection.

Ordinance No. 619, Complainant's Exhibit "BBB."

COMPLAINANT'S EXHIBIT No. BBB.

*Ordinance No. 619.*

An Ordinance Adopting a Map Showing the Plan of the Streets, Blocks and Public Property in the City of Portland.

Whereas, the Common Council of the City of Portland, at its regular meeting held April 29, 1852, adopted the map commonly known as the "Brady Map" as the plan of streets, blocks and public property, and

Whereas, since that date several additions have been made to the city, and whereas a complete plan of all the streets, blocks and public property has been made by order of the Common Council, 817 by C. W. Burrage, and submitted at a meeting of the Common Council held July 18, 1866; now therefore,

The City of Portland does ordain as follows:

SEC. 1. That the "Map of the City of Portland, surveyed and drawn by order of the Common Council, by C. W. Burrage, City Surveyor, 1866," be and is hereby adopted as the official map of the city, showing the plan of the streets, blocks and public property within the city limits.

SEC. 2. That the Auditor and Clerk be and is hereby directed to attach to said map a certified copy of this ordinance, and cause said map and ordinance to be recorded in the records of Deeds in the office of the County Clerk of Multnomah County, Oregon.

Approved February 27, 1869.

818 Mr. FENTON: I offer a portion of Ordinance 1065.

Mr. KAVANAUGH: Same objection.

Objection overruled; exception saved.

Ordinance No. 1065 marked Complainant's Exhibit CCC.

*Ordinance No. 1065.*

An Ordinance Authorizing the Construction and Operation of Street Railways in the City of Portland.

The City of Portland does ordain as follows:

SEC. 1. That there be and hereby is granted unto Levi Estes the right and privilege to lay down and maintain an iron railroad track or tracks within the City of Portland, as follows, viz:

Along North First, First and South First streets; Fifth, North Fifth and South Fifth streets; B street, Washington Street, Taylor Street, Jefferson Street, and Hall Street; and to operate and run

cars thereon to be drawn as hereinafter provided and to convey for hire passengers and their luggage thereon.

SEC. 2. That said Levi Estes, or his assigns, owner or owners of said railway, shall plank, pave or macadamize, as the municipal authorities shall direct, that portion of the street or streets along which their railways shall be laid, the whole length of said railways, between the rails, and shall put and keep in repair such other portions of the street as shall be disturbed in putting down such railway or repairing the same.

\* \* \* \* \*

SEC. 14. All the rights and privileges hereby granted shall expire at the end of twenty-five years from the date of the approval of this ordinance.

Approved September 12, 1871.

819 Mr. FENTON: I wish to call particular attention of Counsel to an ordinance granting to the Oregon & California Railroad Company a sidetrack for the use of the Union Meat Company, in connection with the Fourth Street Line, showing the recognition by the City Council of the Oregon & California Railroad Company as the owner of the Fourth Street franchise and as entitled to use and operate the same, as the successor of the Oregon Central.

Objected to as immaterial, incompetent and irrelevant.

Objection over-ruled; exception saved.

Ordinance referred to is No. 8099, Exhibit QQ.

Mr. FENTON: I offer Sections 95, 97, 100 and 101 of the Charter; I offer these because it relates to Section 106, on which we rely. Section 95 of Charter, Complainant's Exhibit VV.

Section 97 of Charter, Complainant's Exhibit DDD, as follows;

#### *Section 97, City Charter.*

#### Ordinance Embodying Franchise to be Published.

SEC. 97. Before any grant of any franchise or right to use any highway, avenue, street, lane or alley or other public property, either on, above or below the surface of the same shall be made, the proposed specific grant shall be embodied in the form of an ordinance, with all the terms and conditions, including all provisions as to rates, fares and charges, if any, which proposed ordinance shall be published in full at the expense of the applicant for the franchise, at least twice in the city official newspaper. Such publication shall take place and be completed not less than twenty nor  
820 nance, and such ordinance shall require for its passage the affirmative vote of at least two-thirds of all the members of the Council, as shown by the "yeas" and "nays," and the approval of the Mayor before it shall be valid for any purpose; but in case the Mayor should veto any such ordinance it can only be passed over such veto by a four-fifths vote of all the members of said Coun-



cil, in which case the same shall be valid without the Mayor's approval from and after such passage. No amendment to any franchise after publication shall be valid unless the ordinance as amended shall be republished in like manner and for like time as the original.

Section 100 of City Charter marked Complainant's Exhibit EEE.

**Taxation: Requirements of all Franchises: Street Repair: Abandonment.**

SEC. 100. Every franchise granted under this charter shall be taken and deemed as property and shall be subject to taxation as property. Franchises granted to persons or corporations to construct, maintain and operate street railways and other railways and tramways shall provide that the grantee of the franchise or his or its assigns, representatives and successors shall keep those portions of the streets and other public places occupied by said street railways or other railways or tramways in good repair and as required by the Council, and that all persons or corporations to whom franchises are granted to lay down tracks for street railways or other railways and their or its representatives or successors, shall during the life  
821 of such franchise, plank, pave, repave, reconstruct or otherwise improve or repair or maintain in good condition and in the manner directed by the Council and by the Executive Board the whole or any portion of the streets along or over which said street railways or other railways shall be constructed, lying between the rails of any track thereof and extending one foot outside of such rails, and also the portions of the street lying between any two tracks; but in the cases of the franchise or rights granted under sections 102 and 103 of this Charter it may be provided in said franchise that said grantee or his or its assigns, representatives and successors, shall pave, repave and keep in repair as required by the Council the streets used by such railroad from curb to curb.

Such franchise shall contain a provision that in the event any street, or portion of a street, or other public place, granted by said franchise and used by such grantee, his or its representatives and successors, shall during the life of the franchise be abandoned by such grantee his or its successors or assigns, such grantee, or his or its successors or assigns shall forthwith be required to remove its tracks and other property therefrom, and on the removal thereof restore, repair or reconstruct that portion of the street which under his, its or their franchise was to be kept in repair by the grantee, their, his or its, successors or assigns so that it shall be placed in such condition as may be required by the Council and shall contain a provision to the effect that a failure to comply within a reasonable time with any of the provisions or conditions of such  
822 franchise shall authorize the city to declare an immediate forfeiture of such franchise and in the case of said street railways, or other railways or tramways the road or track constructed thereunder shall likewise be forfeited, or in case of such failure, or neglect or refusal of the grantee after thirty days' notice

given by the Council to repair, improve or maintain as above set out the portions of the streets above described then that the said city may at its option do such work and the cost of the same as ascertained and declared by the Council shall be entered in the docket of City Liens and enforced in like manner and with like effect as a general tax upon real or personal property of the grantee after delinquency.

If any street or public place be abandoned as aforesaid, that portion of the franchise under which said street or public place was used by the grantee or his successors shall thereafter be null and void, and shall be forfeited without any further action on the part of the city. On any street or public place being abandoned as aforesaid, the City Engineer shall forthwith file with the Auditor, a certificate giving date of abandonment and description of the street or public place so abandoned, and the Auditor shall forthwith file the same and enter a notation thereof on the records of such franchise in his office. Such franchise shall also contain a provision that if electrical currents are used or employed in or about the use of said franchise or the plant connected therewith, then that the said grantee, his, its or their successors as assigns shall provide and put in use such means and appliances as will control and effectually contain such currents in their proper channels, and on his, its or their own wires, tracks and other structures, so as to prevent injury to the property, pipes and other structures belonging to the City of Portland  
823 or to any person, firm or corporation within said city, and to repair and renew said means and appliances and from time to time to change and improve the same as may be necessary to accomplish said purpose, all at his, its or their charge and expense, and at his, its or their own risk, selecting and adopting such means and appliances as shall prevent injury to the property, pipes and other structures belonging to the said City of Portland or to any person, firm or corporation.

Section 101 marked Complainant's Exhibit FFF.

Further Requirements to be Stated in Ordinance: Time of Construction: Cost: and Time of Completion of Work in Certain Cases.

SEC. 101. In addition to the conditions otherwise required by this Charter and such other conditions as may be prescribed by the Council, franchises must provide for the time of beginning the construction of work thereunder, the estimated total cost of such work, the monthly or yearly sums of money to be expended thereon, and in the case of franchises running to railroad companies, street-car companies and other companies, covering certain streets or portions of streets in such franchises described, fix the time within which the work to be done under such franchise shall be completed upon such streets or portions of streets so described therein.

Mr. FENTON: I want to offer that portion of the Charter in ref-

- 824      erence to nuisances, and Health & Police Power of the City, sub-divisions 25 to 46 of Section 73, relating to "Powers relating to Public Health, Welfare and Safety."  
Marked Complainant's Exhibit "GGG."

COMPLAINANT'S EXHIBIT "GGG."

(c. Powers Relating to Public Health, Welfare and Safety.)

(25.) To make regulations to prevent the introduction of contagious diseases into the city, and to remove persons afflicted with such diseases therefrom to suitable hospitals provided by the city for that purpose, which hospitals may be within or without said city; and to provide and to regulate ~~the~~ hospitals; to secure the protection of persons and property therein, and to provide for the health, cleanliness, ornament, peace and good order of the city.

(26.) To prevent and remove nuisances and to declare what shall constitute the same, and to punish persons committing or suffering nuisances, and to provide the manner of their removal, and to make the cost of such removal a lien upon the property where such nuisance existed; and to fill up or drain any lots, blocks or parcels of land where any stagnant water stands, and to declare the same a nuisance, and to make the cost of filling up or draining the same a lien upon the property so filled or drained. Such liens may upon the order of the Council be entered in the docket of city liens and thereafter collected in the same manner as assessments for street improvements, or may be collected in such other manner as the Council may direct.

825      (27.) To regulate, restrain and to provide for the exclusion from the city, or any part thereof, of stock-yards, tanneries, slaughter houses, wash houses and laundries and all other offensive trades, occupations or businesses.

(28.) To regulate the plumbing, drainage and sewerage of buildings and the use of steam boilers and steam generators, to provide for the registration of plumbers and stationary engineers; to create the offices and define the duties of plumbing inspector and of boiler inspector.

(29.) To compel all persons erecting or maintaining privies or cess-pools within one hundred feet of any street in which a sewer has or may hereafter be constructed, to connect the same therewith; provided, that in cases where blocks are more than two hundred feet in width, this authority shall extend to the center of the block.

(30.) To regulate the construction, care, use and management of hotels, tenement houses, lodging houses and cellars in the City of Portland for the better protection of the lives and health of the inmates dwelling therein, and of others.

(31.) To regulate and to provide for and determine the number and size of places of entrance and exit from all theaters, public halls, places of amusement, churches and other buildings used for public gatherings, and the modes of hanging doors thereat.

(32.) To prevent and prohibit the erection of dangerous and unsafe buildings, and to cause the removal or tearing down of same, wherever situated.

(33.) To prevent the erection or moving of buildings within the city limits which shall be dangerous to the passers-by or to the adjacent property or an obstruction to public travel; and in case any building or structure shall become dangerous to passers-by, the Council shall have power to cause the same to be removed or made safe at the expense of the property upon five days' notice to the owner thereof or his agent, and to determine by resolution when the same is dangerous. Such expense shall be made a lien upon the property. Such liens may upon the order of the Council be entered in the docket of city liens and thereafter collected in the same manner as assessments for street improvements or may be collected in such other manner as the Council may direct.

(34.) To define the fire limits and to prohibit the erection or repair of wooden buildings within the fire limits; to regulate the height, construction, inspection and repair of all private and public buildings within the city; and to create the office and define the duties of building inspector; to establish sidewalk districts and to determine the character of sidewalks in any of said districts and to specify the time at the expiration of which all the sidewalks shall be of a specified character.

(35.) To require adequate fire escapes, apparatus and appliances, for protection against fires, to be provided in buildings.

(36.) To regulate or prevent the storage, manufacture and sale of dangerous, explosive, or combustible materials, including gun-powder, dynamite, giant powder, calcium carbide, nitro-glycerine, oil and gas, and to provide for the inspection of the same; to prevent by all proper means all risks of injury or damage by fire arising from negligence or otherwise.

(37.) To regulate the transportation of gun-powder, dynamite, nitro-glycerine and other combustibles and explosives through the streets of the city.

(38.) To regulate and prohibit the use of all guns, pistols and firearms, missile weapons, fireworks, firecrackers, bombs and all detonators of all descriptions.

(39.) To regulate and prevent public criers, advertising notices, steam whistles, the ringing of bells and playing of bands.

(40.) To regulate, prevent and prohibit the erection, maintenance or display of signboards and billboards, and of signs, posters or other advertisements, or advertising matter which are of offensive, improper, unsightly, indecent, lascivious or obscene upon, along or near the sidewalks, streets or public places.

(41.) To regulate and prohibit the exhibition and hanging of banners and placards or flags in or across the street or from houses or other buildings.

(42.) To regulate or to prohibit the driving of horses, cattle, sheep, hogs and other animals and livestock through the streets.

(43.) To restrain and regulate the keeping of all domestic animals and to prevent any and all domestic animals from running at

large within the city or any part thereof, and to punish those who allow animals so to run; to provide for the impounding of the same and also to provide for the sale of such animals upon five days' notice.

(44.) To regulate and restrain the keeping and the running at large of dogs; to punish those persons who allow their dogs to be unlicensed or to run at large against the regulations established, and to provide for the impounding of dogs and for the killing of the same when kept against such regulations, or on which no license has been obtained or tax xpaid as provided by the Council.

(45.) To protect the public from injury by runaways by punishing persons who leave horses or carriages in the streets without being fastened.

(46.) To require all railways and railroads to provide proper fenders and other safety appliances and the latest and most approved machinery and methods for their cars and tracks and the operation thereof for the protection of human life and the lessening of danger thereto and to enforce such regulations by such fines and penalties as may be prescribed by ordinance.

MR. FENTON: I have here a certified copy of the map of definite location of the Oregon Central that I had to send to Washington for.

Map marked Complainant's Exhibit "HHH."

(Map heretofore offered at close of Complainant's case.)

829 MR. FENTON: I wish to have identified the ordinance, the number of which was left blank in the record. This is ordinance No. 3479, showing the vacation of North Fourth Street, so that this railroad could get into the Northern Pacific Terminal Company and use part of it.

Ordinance No. 3479 referred to is Plaintiff's Exhibit "JJ".

MR. FENTON: Ordinance No. 2969.

Objected to as incompetent, irrelevant and immaterial.

Objection over-ruled; exception saved.

Ordinance No. 2969, Exhibit "III".

830 Ordinance No. 2969 marked Complainant's Exhibit III.

An Ordinance Authorizing the Oregonian Railway Company (Limited) to Lay a Railway Track and Run Cars Over the Same Within the City of Portland.

The City of Portland does ordain as follows:

SEC. 1. The Oregonian Railway Company (Limited) is hereby authorized and permitted to place a railway track and run cars over the same in or on streets hereinafter designated, to-wit; In Mill Street from the northwest corner of block No. 103 in the City of Portland, to Front Street, and in Front Street from where such track enters Front Street, to Madison Street, and thence in Madison Street by a convenient curve to the east line of Block 71 in said city. The track shall in all instances be laid along the center of the respective

streets, except where curves are necessary; but in no instance shall such track be further than 15 feet from the center of the street along which it is laid. The elevation of such track when laid in Front Street shall conform to the established grade of said Front Street.

SEC. 2. The said railroad company shall grade to established grades, and construct and maintain in good repair said streets, at least three feet in width, upon each side of the center line of said track, and as much wider as may be affected by said railway, or the construction thereof, in such manner and as often as the Common Council of the City of Portland may at any time provide for or require.

SEC. 3. The Common Council reserve the right to make or to alter regulations at any time, as they may deem proper for the conduct of the said road within the limits of the city, and the speed of railway cars and locomotives within said limits, and may restrict or prohibit the running of locomotives at such time, and in such manner as they may deem necessary.

SEC. 4. It is hereby expressly provided that any refusal or neglect of the said Oregonian Railway Company (Limited) to comply with the provisions and requirements of this ordinance, or any other ordinance passed in pursuance hereof, shall be deemed a forfeiture of the rights and privileges herein granted; and it shall be lawful for the Common Council to declare by ordinance the forfeiture of the same and to cause the said rails to be removed from said streets.

Approved January 7, 1881.

832 Mr. FENTON: I offer ordinance No. 3036.  
 Objected to as immaterial, incompetent and irrelevant.  
 Objection over-ruled; exception saved.  
 Ordinance No. 3036 Complainant's Exhibit "JJJ".

"COMPLAINANT'S EXHIBIT "JJJ".

*Ordinance No. 3036.*

**An Ordinance Prohibiting the Blowing of Steam Railroad Whistles Within the City Limits.**

Whereas, it is within the power and authority conferred upon the Common Council by the charter of the City of Portland to prohibit the blowing of steam whistles within the city limits; and,

Whereas, All ordinances passed by the Common Council granting the right to lay tracks and run cars over the same in the city contain a provision reserving the right to make such regulation as the Council deem proper for the conduct of said road within the limits of the City, therefore

The City of Portland does ordain as follows:

SEC. 1. That from and after the approval of this ordinance, it shall be unlawful for any steam railroad to blow a steam whistle



within the limits of the city of Portland, except as a signal of danger.

SEC. 2. A violation of the provisions of this ordinance shall be deemed a misdemeanor, and on conviction thereof, the offender shall be subject to a fine of not less than ten dollars (\$10) nor more than fifty (\$50) dollars, or imprisonment in the city jail not less than five (5) days, nor more than twenty-five (25) days.

Approved March 18, 1881.

833 Mr. FENTON: I offer Ordinance No. 3477.

Objected to as immaterial, incompetent and irrelevant.

Objection overruled; exception saved.

Ordinance No. 3477 marked Complainant's Exhibit KKK.

#### COMPLAINANT'S EXHIBIT KKK.

An Ordinance Authorizing D. E. Budd and His Associates to Construct and Operate Street Railways in the City of Portland.

The City of Portland does ordain as follows:

SEC. 1. That there be and is hereby granted unto D. E. Budd and such other person or persons as he may associate with himself therein, the right and privilege to lay down and maintain an iron railroad track or tracks and to operate street railways within the City of Portland as follows, to-wit; First, along Washington Street from First street to its intersection with the center line of B Street. Second, along North Twentieth Street from the center line of B Street to the center of S Street. Third, along Eleventh Street from the center line of Washington to Market Street, the line of route on Eleventh to be a continuation of the line or route on Washington street.

\* \* \* \* \*

SEC. 15. All the rights and privileges hereby granted shall expire at the end of thirty (30) years from the date of the approval of this ordinance.

Approved June 12, 1882.

834 Mr. FENTON: I offer Ordinance No. 3637.

Objected to as incompetent, immaterial and irrelevant.

Objection overruled; exception saved.

Ordinance No. 3637 marked Complainant's Exhibit LLL.

#### COMPLAINANT'S EXHIBIT LLL.

##### *Ordinance No. 3637.*

An Ordinance Authorizing the Construction and Operation of a Street Railway on Certain Streets in the City of Portland, Oregon.

The City of Portland does ordain as follows:

SEC. 1. That there be and is hereby granted unto H. W. Monastes, Joseph Paquet, L. W. Bates, and D. F. Leahy, and F. M. Speed,

jointly, and their associates, successors and assigns, the right to construct, maintain and operate, with animals, a single track street railway, with the necessary turnouts and appurtenances for the period of thirty years from the passage of this ordinance on the following named streets in the city of Portland in the manner and upon the conditions hereinafter prescribed:

First. Beginning on the West side of First Street on Stark Street, thence along Stark Street to Second Street, thence along Second and North Second streets to C street, thence along C street to northeast Park Street, thence along North East Park Street to H Street, thence along H Street to North West Park Street.

Second. From the intersection of Stark and Second Streets, along Second to Yamhill, thence on Yamhill to Sixth, thence along Sixth and South Sixth street- to Caruthers.

\* \* \* \* \*

835 Approved December 8, 1882.

Mr. FENTON: I offer Ordinance No. 3639.

Objected to as immaterial, irrelevant and incompetent.

Objection overruled; exception saved.

Ordinance No. 3639 marked Complainant's Exhibit MMM.

#### COMPLAINANT'S EXHIBIT MMM.

##### *Ordinance No. 3639.*

An Ordinance Granting the Multnomah Railway Company the Right to Construct and Operate Street Railways.

The City of Portland does ordain as follows:

SEC. 1. That there be and hereby is granted to the Multnomah Railway Company, its successors and assigns, the right and privilege to lay down and maintain an iron or steel track or tracks and to operate street railways within the city of Portland as follows: North—from west side of Front Street at Morrison street, along Morrison street, to Sixth street, thence along Sixth street to Pine street, thence along Pine street to North Seventh street, thence along North Seventh street to H street, thence along H street to North Eighth street, thence on North Eighth street to P street.

\* \* \* \* \*

Approved December 8, 1882.

836 Mr. FENTON: I offer Ordinance No. 3672.

Objected to as immaterial, incompetent and irrelevant.

Objection overruled; exception saved.

Ordinance No. 3672 marked Complainant's Exhibit NNN.

## COMPLAINANT'S EXHIBIT NNN.

*Ordinance No. 3672.*

An Ordinance Authorizing the Transcontinental Street Railway Company to Construct and Operate Street Railways in the City of Portland.

The City of Portland does ordain as follows:

SEC. 1. That there be and is hereby granted unto the Transcontinental Street Railway Company the right and privilege to lay down and maintain an iron railroad track or tracks and to operate street railways within the city of Portland as follows, to-wit:

Along G street from North Twenty-first Street to North Third street, along North Third street, Third, and South Third Street, from G street to Sheridan street.

\* \* \* \* \*

SEC. 16. All rights and privileges hereby conferred shall expire at the end of thirty years from the date of the approval of this ordinance.

Approved December 22, 1882.

837 Mr. FENTON: I offer Ordinance No. 3684.

Objected to as immaterial, incompetent and irrelevant.

Objection overruled, exception saved.

Ordinance No. 3684 marked Complainant's Exhibit OOO.

## COMPLAINANT'S EXHIBIT OOO.

An Ordinance Granting to the Multnomah Street Railway Company the Right to Construct and Operate a Street Railway on Certain Streets in the City of Portland, Oregon.

The City of Portland does ordain as follows:

SEC. 1. The right is hereby granted to the Multnomah Street Railway Company and assigns, to lay down and maintain for a period of thirty years from the date of the passage of this ordinance a single track, or double — railway, at the option of said railway company, with the necessary turnouts and turntables, and operate thereon passenger cars, upon certain streets within the limits of the city of Portland, to-wit: On North Fifteenth street from B street to S street, also on B street from First street to the present western boundary of the city, with the privilege of extending the same on the line of B street extended to the city park; provided, that, after said B street is extended and graded under authority of the city, to the City Park, the railway track hereby authorized thereon shall be laid down on such extension within six months thereafter. A failure so to do shall work a forfeiture of the privilege hereby granted to lay said railway track on said extension of B street. Said railway

track is to be composed of iron or steel rails weighing not less than twenty-three (23) pounds to the yard and is to be laid of the same width as the railway track now laid on Washington Street.

\* \* \* \* \*

Approved January 5, 1883.

Mr. FENTON: I offer Ordinance No. 3773.

Objected to as immaterial, irrelevant and incompetent.

Objection overruled; exception saved.

Ordinance No. 3773, marked Complainant's Exhibit PPP.

#### COMPLAINANT'S EXHIBIT PPP.

##### *Ordinance No. 3773.*

An Ordinance Authorizing D. E. Budd, C. J. McDougall, Ira B. Sturges and Chas. F. Crowell to Construct and Operate Certain Street Railways in the City of Portland, Oregon.

The City of Portland does ordain as follows:

SEC. 1. That there be and hereby is granted unto D. E. Budd, C. J. McDougall, Ira B. Sturges and Charles F. Crowell and such other person or persons as they may associate with them, the right and privilege to lay down and maintain an iron railway track or tracks, and to operate a street railway within the city of Portland, as follows, to-wit: First, beginning at the east end of Jefferson street and Water street and running thence southerly along Water street crossing Columbia, Clay, Market, Mill, Montgomery, Harrison, Hall, Lincoln, Grant, Sheridan, and Caruthers streets to Block F. Thence southerly across block F to Sheridan street as soon as a street shall be opened up and improved through said Block F; thence 839 in the same course crossing Sheridan street to the center of unnamed streets not yet opened up — improved, between the old Jewish cemetery and blocks I, J, K, L, M, and P. Thence along said unnamed streets in a southerly direction to Woods street; thence across Woods street south along Hood street, crossing Grover street to Gibbs street; thence east along Gibbs streets to Multnomah street; thence along Multnomah street to the south limit of the city of Portland.

\* \* \* \* \*

SEC. 15. All the rights and privileges hereby granted shall expire at the end of thirty (30) years from the date of the approval of this ordinance.

Approved May 4, 1883.

Mr. FENTON: I offer Ordinance No. 3829.

Objected to as immaterial, incompetent and irrelevant.

Objection overruled; exception saved.

Ordinance No. 3829 marked Complainant's Exhibit QQQ.

## COMPLAINANT'S EXHIBIT QQQ.

*Ordinance No. 3829.*

An Ordinance Authorizing the Transcontinental Street Railway Company to Construct and Operate Street Railways in the City of Portland.

The City of Portland does ordain as follows:

SEC. 1. That there be and is hereby granted unto the Transcontinental Street Railway Company the right and privilege to lay down and maintain an iron railroad track or tracks, and to operate 840 street railways within the City of Portland as follows, to-wit: Along North Thirteenth Street from the center line of G street to the center of S street; thence westerly along the center line of S street to the center line of North Sixteenth street.

\* \* \* \* \*

SEC. 16. All rights and privileges hereby conferred shall expire at the end of thirty (30) years from the date of the approval of this ordinance.

In force by operation of law, June 18, 1883.

Mr. FENTON: I offer Ordinance No. 3884.

Objected to as immaterial, incompetent and irrelevant.

Objection overruled; exception saved.

Ordinance No. 3884 marked Complainant's Exhibit RRR.

## COMPLAINANT'S EXHIBIT RRR.

*Ordinance No. 3884.*

An Ordinance Granting to the Multnomah Street Railway Company the Right to Construct and Operate a Street Railway on Certain Streets in the City of Portland, Oregon.

The City of Portland does ordain as follows:

SEC. 1. The right is hereby granted to the Multnomah Street Railway Company and its assigns to lay down and maintain for a period of thirty years from the date of the passage of this ordinance, a single or double track railway, at the option of said railway company, with the necessary turnouts and turntables, and operate thereon passenger cars, upon certain streets within the limits of the city of Portland, to-wit: On Eleventh Street from the North line of Market street to the north line of Montgomery street, in the 841 city of Portland, said railway track or tracks to be composed of iron or steel rails weighing not less than twenty-three (23) pounds to the yard and to be laid of the same width as the railway now laid on Washington and Eleventh streets, in said city.

\* \* \* \* \*

Approved July 20, 1883.

Mr. FENTON: I offer Ordinance No. 3903.

Objected to as incompetent, immaterial and irrelevant.

Objection overruled; exception saved.

Ordinance No. 3903 marked Complainant's Exhibit SSS.

### COMPLAINANT'S EXHIBIT SSS.

#### *Ordinance No. 3903.*

An Ordinance Authorizing George W. Weidler and Robert Irving and Their Assigns to Construct, Maintain and Operate Street Railways in the City of Portland.

The City of Portland does ordain as follows:

SEC. 1. That there be and is hereby granted unto George W. Weidler and Robert Irving, and their assigns the right and privilege to lay down, maintain and operate an iron railway track or tracks and to operate street railways within the city of Portland, as follows, to-wit:

First. Commencing at what would be the center line of North Front Street if extended at the north boundary line of the city, thence along North Front Street extended and North Front street to its intersection with F street; thence along F street to 842 North Second street, thence southerly along North Second and Second streets to Morrison or Yamhill streets, thence westerly along either Morrison or Yamhill streets to the intersection of Sixth street, thence southerly along Sixth street, to Jefferson, thence westerly along Jefferson street and the Canyon road to the west boundary line of the city.

Second. From the intersection of North Front and D streets along D street to the center line of North Eighteenth street, thence along North Eighteenth street to the center line of E street, thence along E street westerly to the center line of what is known as the Balch County Road, thence northerly to a connection with the center of North Twenty-second Street, thence along North Twenty-second street to its intersection with P street, thence easterly along P street to the center of North Eighth street, thence southerly along North Eighth street to its intersection with D street.

\* \* \* \* \*

SEC. 16. All rights and privileges hereby conferred shall expire at the end of thirty (30) years from the date of the approval of this ordinance.

\* \* \* \* \*

Approved August 17, 1883.

Mr. FENTON: I offer Ordinance No. 3935.

Objected to as immaterial, incompetent and irrelevant.

Objection overruled; exception saved.

Ordinance No. 3935 marked Complainant's Exhibit TTT.



## COMPLAINANT'S EXHIBIT No. TTT.

843

*Ordinance No. 3935.*

An Ordinance to Amend Ordinance No. 3656, Entitled "An Ordinance Authorizing the Northern Pacific Terminal Company of Oregon, its Successors and Assigns, to Construct and Maintain a Double Railway Track in North Front Street, in the City of Portland, from the Northern Limits of said City to the South Line of P Street, and a Single Track from thence to a Point Opposite the Southwest Corner of Block G and Eighty Feet Distant therefrom, with a Sidetrack from a Point Opposite Block 220 to Block H, both in Couch's Addition to said City of Portland, also Sufficient and Suitable Sidetracks from, at, or near the Foot of P Street, Curving across and along East and West Park Streets and M, N, O and P Streets, and to Confirm to the Oregon and California Railroad Company the Right to Maintain and Operate its Main and Side Tracks in North Front Street in said City." Approved December 8, 1882.

The City of Portland does ordain as follows:

SEC. 1. That Section 1 of said Ordinance No. 3656, approved December 8, 1882, be and the same is hereby amended, so as to authorize and permit the Northern Pacific Terminal Company of Oregon to construct and maintain a double railroad track along North Front street in the City of Portland, the center line of each track to be located seven feet from and on either side of the center line of said street from the northern boundary of said city to a point of intersection with the south line of P street instead of six feet from and on either side of the center line of said Front street as in said Ordinance No. 3656 now provided.

844 SEC. 2. That said Section 1 of said Ordinance No. 3656 be and the same is hereby amended so that the same shall hereafter read as follows:

SEC. 1. The Northern Pacific Terminal Company of Oregon its successors and assigns are hereby authorized and permitted to construct and maintain a double railroad track along North Front street in the City of Portland, the center line of each track to be located seven feet from and on either side of the center line of said street from the northern boundary line of said city to a point of intersection with the south line of P street in Couch's Addition to said city produced, and a single track from thence to a point opposite the southeast corner of Block G in said Couch's Addition with its center eighty feet in an easterly direction therefrom.

And also a side track from a point in said main track opposite the southeast corner of fractional Block 222 in said Couch's Addition, to a point at or near the northwest corner of fractional Block H in said Couch's Addition with a branch track from a point in said side track near the southeast corner of Block 221 in said Couch's

Addition to a point in the west line of said Block H about forty feet from the northwest corner thereof.

And also the right to construct and maintain sufficient and suitable side tracks, branches and turnouts branching off from said double track in North Front Street, between the west line of North Eighth street extended, and the west line of East Park street extended thence along in and across East Park street and west  
845 Park streets and M, N, O and P streets as nearly as practicable as said main and side tracks are now shown and designated upon the annexed map or plat by red lines which plat is made part hereof, and to run locomotives and cars over the same upon the terms and conditions herein provided.

The Northern Pacific Terminal Company in the exercise of the rights and privileges hereby granted shall not construct any of its main or side tracks in or along North Front Street east of the east line of East Park Street, extended, unless, or until it shall have agreed with the Oregon and California Railroad Company for the purchase or leasing of the property of said Oregon and California Railroad Company, situate on either side of said Front street for terminal purposes and for the occupation or use by the said Oregon and California Railroad Company in common with other railroad and transportation companies of the terminal facilities to be provided by the said Northern Pacific Terminal Company, the said Oregon and California Railroad Company, its successors and assigns, is hereby authorized to maintain and operate for the purpose of a railroad operated by steam, its main and side tracks as now located, constructed and used in said North Front street until such time as the Northern Pacific Terminal Company shall have constructed and completed its terminal buildings and railroad tracks, and shall have by agreement with the said Oregon and California Railroad Company extended its tracks upon North Front street south of the east line of East Park street.

846 The right hereby granted may be exercised and tracks, branches, turnouts and sidetracks may be constructed and maintained by the said Northern Pacific Terminal Company, its successors and assigns, for the use of the Northern Pacific Railroad Company, the Oregon Railway and Navigation Company, the Oregon and California Railroad Company, the Oregon Improvement Company, the Oregon and Transcontinental Company, the Oregonian Railway Company, Limited, The Pacific Steamship Company, and any other railroad or transportation companies to whom the right to use the terminal buildings and facilities may be leased by the Northern Pacific Terminal Company.

Approved September 7, 1883.

Mr. FENTON: I offer Ordinance No. 4072.

Objected to as incompetent, irrelevant and immaterial.

Objection overruled; exception saved.

Ordinance No. 4072, marked Complainant's Exhibit UUU.

## COMPLAINANT'S EXHIBIT UUU.

*Ordinance No. 4072.*

**An Ordinance Authorizing J. W. Cooke and Julius Ordway and Their Assigns to Construct, Maintain and Operate Street Railways in the City of Portland.**

The City of Portland does ordain as follows:

SEC. 1. That there be and is hereby granted unto J. W. Cooke and Julius Ordway, and their assigns the right and privilege to lay down, maintain and operate an iron or steel railway track or tracks and to operate a system of street railways within the city of Portland, to-wit:

847 First. Commencing at a point on the center of Stark street where the same intersects the west line of Front street, thence westerly along Stark street, to the center line of Ninth Street.

Second. Commencing at the intersection of North Seventh and N streets and running thence southerly along North Seventh to A street thence southwesterly to Seventh street, and running thence southerly along Seventh street to the center of Morrison street.

Third. Commencing at the intersection of North Fifth and J Streets, thence southerly along North Fifth street, Fifth street and South Fifth street, to the south line of Caruthers.

Fourth. Commencing at the intersection of South Fifth and Caruthers street, thence easterly along Caruthers street to the center of South First street, and thence southerly along South First street to the north line of Thomas street.

Fifth. Commencing at a point on the north line of R street, which point is also the intersection of North Tenth and North Front streets, and running thence southerly along North 10th street to where the same intersects with Ninth street, thence along Ninth street southerly to the north line of Myrtle street.

Sixth. Commencing at the west line of Front street where the same intersects the center line of Montgomery street, thence westerly along Montgomery street to where the same intersects what is known as the Terrace road, thence along said Terrace road to the west boundary thereof.

848 Seventh. Commencing at the intersection of Sixth and Morrison streets, and running thence westerly along Morrison street to the west boundary of said Morrison street.

\* \* \* \* \*

SEC. 14. All rights and privileges hereby conferred shall expire at the end of thirty (30) years from the date of the approval of this ordinance.

\* \* \* \* \*

Approved December 21, 1883.

849 Mr. FENTON: Ordinance No. 5100. (Compilation 1905.)  
Objected to as immaterial, incompetent and irrelevant.  
Objection overruled; exception saved.  
Ordinance No. 5100, marked Complainant's Ex. VVV.

COMPLAINANT'S EXHIBIT VVV.

*Ordinance No. 5100.*

(Railroad Franchise Owned by the Oregon and California Railroad Company, Leased by the Southern Pacific Company.)

An Ordinance Granting to the Portland and Willamette Valley Railway Company, its Successors and Assigns, a Right of Way Over Certain Lands Belonging to the City of Portland.

(Preamble.)

Whereas the Portland and Willamette Valley Railway Company is now constructing a line of railroad connecting the City of Portland with the Willamette Valley;

And whereas it will be necessary for said railroad to pass over certain lands owned by the City of Portland and are now partially occupied by the water works of said city;

And whereas the Water Committee have recommended that said right of way be granted, now therefore,

The City of Portland does ordain as follows:

(Right of Way.)

SECTION 1. The City of Portland hereby grants to the Portland and Willamette Valley Railway Company, its successors and assigns, a right of way for said railroad, as shown and described on the map and plat filed with the petition of the said company, across the following premises, being the same premises conveyed by the East of Scotland Investment Company, Limited, to the Portland  
850 Water Company, dated May 18, 1883, and which deed is recorded at Page 155 of Book 78, Records of Deeds of Multnomah County, State of Oregon, to which reference is hereby made.

(Company to Construct Switch.)

SEC. 2. Said Railway Company shall, within sixty days after the completion of its road from the Town of Dundee to the City of Portland construct a switch from the main track of said railway to the engine house on said lands belonging to the City of Portland, sufficient to hold twenty-two cars and maintain and keep the same in repair. Second, shall upon constructing said railway, construct and maintain and keep in repair a safe and suitable crossing from the Macadam Road to the dwelling house situated on said lands. Third, shall construct, maintain and keep in repair a trestle or sub-

way where said railway line crosses the water main leading from the pump house at the time of constructing said railroad, the same to be constructed in such a manner as to give free access to said main and pipes.

(Acceptance.)

SEC. 3. The Portland and Willamette Valley Railway Company shall, within thirty days after the approval of this Ordinance by the Mayor, file with the Auditor and Clerk a written acceptance of the terms and conditions of this Ordinance.

(Deed for Right of Way to be Executed—When.)

SEC. 4. That upon the compliance with the provisions of this Ordinance by the said Portland and Willamette Valley Railway Company, the Mayor and Auditor and Clerk are hereby instructed to execute and deliver to said Company a good and sufficient deed conveying to said company a right of way over and upon said 851 lands; provided, always, and this right of way is granted upon the express condition that the said City of Portland shall have, and it does hereby reserve the right to make, construct, use and maintain all such road or roads, and the necessary crossings for teams and vehicles, over, across and upon said right of way, and the track or tracks of said company thereon constructed at such points as may be necessary or required, for the use of said City of Portland, or the "Water Committee" and "Water Commission", of said City created by an Act of the Legislative Assembly of the State of Oregon, entitled "An Act to amend an Act entitled 'An Act to incorporate the City of Portland,'" approved October 24, 1882, approved November 25, 1885, or any or either of them or their successors or assigns, the place or points of such crossings to be selected by said "Water Committee" or "Water Commission", or their successors or assigns; and also the right to make, construct, use and maintain all such chute or chutes across said right of way and under the track of said company thereon constructed at such points as may be necessary, convenient or required by the said City of Portland, or said "Water Committee" or "Water Commission" for the purpose of passing wood through the same from the highway on the west side of the said right of way to the pumping station on the east side thereof, and said deed, hereby directed to be made, shall contain the proper clause and provisions to reserve unto said City of Portland, its successors and assigns, the rights herein enumerated.

Passed the Common Council June 15, 1887.

Approved June 17, 1887.

JOHN GATES, *Mayor*.

Acceptance filed, June 17, 1887.

852 Mr. FEXTON: Ordinance No. 5568.

Objected to as incompetent, immaterial, and irrelevant.

Objection overruled; exception saved.

Ordinance No. 5568 marked Complainant's Exhibit WWW.

## COMPLAINANT'S EXHIBIT WWW.

*Ordinance No. 5568.*

(Franchise Owned by the Northern Pacific Terminal Co.)

An Ordinance Authorizing the Northern Pacific Terminal Company of Oregon to Construct and Maintain Certain Railroad Tracks in and Across Certain Streets in the City of Portland.

The City of Portland does ordain as follows:

(Franchise—Route.)

SECTION 1. The Northern Pacific Terminal Company of Oregon, its successors and assigns, is hereby authorized and permitted to construct, lay down and maintain a suitable and sufficient number of railroad tracks in and across North Seventh Street, West Park and East Park Streets, "M", "N", and "O" Streets, in the City of Portland, to connect with the main lines of said company's railroad system in North Portland, as nearly as practicable as shown and described upon the map or plat known as "Plan No. 6" adopted by said company, a copy of which is on file in the office of the Auditor and Clerk of the City of Portland, and to run locomotives and cars over the same; provided, however, that the rails shall be laid flush with the pavement so as not to interfere with the passage of vehicles to any greater extent than is absolutely necessary, and the use and crossing of said streets shall be in such manner as not to interfere with the free use thereof by the public as a highway.

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(Company to Improve—What.)

SECTION 2. Said Northern Pacific Terminal Company of Oregon shall grade to the established grade, macadamize, pave or plank to full width as the Common Council of said city may direct, and maintain in good repair, the portions of said streets so used by it, and over which it constructs and maintains such railroad tracks, between the rails of all its said tracks, and at least two feet in width upon each side thereof, and also to so grade to established grade, macadamize, pave or plank to full width, and maintain in good repair all parts of "M" and "N" streets which lie between North Front street and the bridge hereinafter referred to, and to be constructed as set forth in Section 5 of this Ordinance; and shall do and perform such work, and the improvement and repair of such portions of said streets in such manner and as often as the Common Council of the City of Portland may provide for or require.

(Company to Pay for Street Improvements.)

SECTION 3. Alterations of grades of streets required for the laying of said railway tracks, and all improvements and repairs of the same for said purpose shall be made at the expense of said Northern



Pacific Terminal Company of Oregon, and the same shall be made as provided by ordinance.

(Rights Reserved.)

SECTION 4. The Common Council reserve the right to make or to alter regulations at any time, as they deem proper for enforcing the provisions and terms of this Ordinance, and for the conduct of the said road within the limits of the city, and the speed of rail-  
854 way cars and locomotives, within said limits, and may restrict or prohibit the running of locomotives at such time and in such manner as they may deem necessary and may require said company to employ and station one or two more flagmen on said streets to warn people of the approach of cars, trains or engines.

(Company to Make Certain Improvements—When.)

SECTION 5. The said Northern Pacific Terminal Company shall, at its own cost and expense and within four months from the approval of this Ordinance, construct and maintain in good condition, to the satisfaction of the Common Council, a bridge (equally as commodious, safe and strong as the bridge at present on North Thirteenth Street between "Q" and "R" streets,) on North Seventh street, from the north line of "J" Street to "L" Street, and thence along the westerly side of the tracks of said Terminal Company, as hereinbefore referred to, to "O" street, and to fill to established grade and macadamize or plank, full width all of "O" Street from the west line of West Park Street to the west line of North Front Street, and all of West Park Street from the north line of "O" Street to the west line of North Front street; such bridge shall have a wagon roadway thirty six feet wide with a sidewalk six feet wide and each side thereof; and to keep open as a public highway all that portion of the same running along the westerly side of the tracks from "L" street to "O" street, full width.

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(Forfeiture Clause.)

SECTION 6. For failure to comply with any of the provisions of this Ordinance or any regulation made by the Common Council in pursuance thereof, the Common Council may declare forfeited all the privileges hereby granted and the same shall thereupon become null and void.

(Acceptance.)

SECTION 7. Within ten days from the passage of this Ordinance, said Northern Pacific Terminal Company shall make and file with the Auditor and Clerk, a written acceptance of the provisions of this Ordinance, otherwise it shall not be entitled to any of the benefits, rights, or privileges hereby conferred.

Passed the Common Council, September 7, 1888.

Approved September 11, 1888.

VAN B. DE LASHMUTT, *Mayor.*

Acceptance filed September 15, 1888.

856 Mr. FENTON: I offer Ordinance No. 11086.

Objected to as incompetent, irrelevant and immaterial.

Objection over-ruled; exception saved.

Ordinance No. 11086, Complainant's Exhibit XXX.

### COMPLAINANT'S EXHIBIT XXX.

#### *Ordinance No. 11086.*

(Franchise Owned by the Northern Pacific Terminal Company.)

An Ordinance Authorizing the Placing of a Permanent Railway Track in Upshur Street Between the Westerly Line of Fifteenth Street to a Point One Hundred Feet Westerly from the West Line of Eighteenth Street, in Watson's Addition to the City of Portland, Multnomah County, Oregon.

The City of Portland does ordain as follows:

#### (Franchise—Route.)

SECTION 1. That the right and privilege is hereby granted to the Northern Pacific Terminal Company, of Oregon, a corporation duly organized and existing under and by virtue of the laws of the State of Oregon, to lay down, maintain and operate a permanent branch railway track of standard gauge in Upshur Street, in Watson's Addition to the City of Portland, County of Multnomah, and State of Oregon, from a connection with the main track of the Northern Pacific Terminal Company of Oregon at a point just westerly from where the west line of Fifteenth street intersects said Upshur Street, and running thence west along said street, outside the curb line, to a point one hundred feet west from the intersection of the west  
857 line of Eighteenth Street with said Upshur Street, and opposite the center line of Block 21, in said Watson's Addition to said city.

#### (Tracks—Streets to Improve.)

SECTION 2. Said branch track shall be laid flush with the pavement or grade of the street, the south rail thirty-six inches from the south curb line of said Upshur Street, and shall be so laid and maintained as not to obstruct or interfere with the public travel or traffic upon said street; and said Northern Pacific Terminal Company shall at all times, while said track is so maintained, keep the street in good repair between the rails of said track and for two feet on each side thereof; and shall also plank or replank, pave or repave, macadamize or remacadamize, reconstruct or repair, the said street between the rails of said track and for two feet on each side thereof, whenever directed to do so by the municipal authorities of the City of Portland.

## (Duration.)

SECTION 3. All rights and privileges hereby conferred shall expire at the end of thirty three years from the date of the approval of this Ordinance.

## (Acceptance.)

SECTION 4. A written acceptance of the terms of this Ordinance shall first be filed by the Northern Pacific Terminal Company of Oregon, with the Auditor and Clerk of said City before laying any track mentioned in this Ordinance, and within thirty days after the approval thereof.

SECTION 5. All ordinances or parts of ordinances in conflict herewith are hereby repealed.

Passed the Common Council January 4, 1899.

Approved January 9, 1899.

W. S. MASON, *Mayor*.

Approved by the Board of Public Works, January 9, 1899.  
Acceptance filed February 1, 1899.

858 Mr. FENTON: I offer Ordinance No. 13054.

Objected to as incompetent, irrelevant and immaterial.

Objection over-ruled; exception saved.

Ordinance No. 13054 marked Complainant's Exhibit YYY.

## COMPLAINANT'S EXHIBIT YYY.

*Ordinance No. 13054. --*

(Franchise Owned by the Northern Pacific Terminal Company.)

An Ordinance Authorizing the Northern Pacific Terminal Company of Oregon to Place a Side Track on Front Street.

The City of Portland does ordain as follows:

## (Franchise—Route.)

SECTION 1. That the right and privilege be, and hereby is granted to the Northern Pacific Terminal Company of Oregon, a company duly incorporated and organized under the laws of the State of Oregon, to lay down, construct, maintain and operate a switch track of standard gauge, to connect with the present track of said company, on Front Street at a point in the center of said Front street at and near the point of intersection of the north line of Thurman Street with the west line of Front Street, and running thence northerly, curving to the right and along and parallel to the east line of Front Street, in front of river lots ten (10), eleven (11), twelve (12), thirteen (13), fourteen (14), fifteen (15), sixteen (16), and seven-

teen (17), in Watson's Addition to the City of Portland, a distance of about seven hundred and fifty (750) feet.

(Rails—How Laid—Streets to Repair.)

SECTION 2. Said switch track shall be laid as nearly as possible flush with the pavement or grade of said Front street and so  
859 as not to obstruct or interfere with the public travel and traffic on the said street, and said The Northern Pacific Terminal Company of Oregon, shall, at all times while said switch track is so maintained, keep the street in good repair between the rails of said track and for two feet on each of the sides thereof, the same to be planked, paved, macadamized and improved whenever directed thereto by the municipal authorities.

(Operation of Cars.)

SECTION 3. The operation of cars over the switch track herein provided for shall be subject to the supervision and direction of the Committee on Streets and the City Engineer of the said City of Portland, and the right is herein reserved to cause The Northern Pacific Terminal Company of Oregon to remove said track and place said street in like condition as the same was before the construction of said track whenever the maintenance and operation of the same shall be or become in anywise contrary to the ordinance of said city, or to the interference with public travel and traffic upon said Front street.

(Acceptance.)

SECTION 4. A written acceptance of the terms of this Ordinance and an agreement to comply with the terms hereof shall be first filed by the said The Northern Pacific Terminal Company of Oregon with the Auditor of said city before laying any track mentioned in this Ordinance, and within thirty days after the approval thereof.

(Forfeiture.)

SECTION 5. A failure to lay all the track herein provided  
860 for within six months from the date of the passage hereof shall at once, and without any act of the said city, forfeit all the rights and privileges granted herein.

Passed the Common Council, November 5, 1902.

Approved, November 11, 1902.

GEO. H. WILLIAMS, *Mayor*.

Approved by the Board of Public Works, November 18, 1902.  
Acceptance filed, November 22, 1902.

Mr. FENTON: I offer Ordinance No. 13089.

Objected to as incompetent, irrelevant and immaterial.

Objection overruled; exception saved.

Ordinance No. 13089 marked Complainant's Exhibit ZZZ.

## COMPLAINANT'S EXHIBIT ZZZ.

*Ordinance No. 13089.*

An Ordinance Granting to Portland Railway Company, Its Successors and Assigns, the Right to Construct, Acquire, and Own, and to Maintain, Operate and Use Railways and Poles and Wires and Underground Conduits, Cables, and Conductors in the City of Portland, Oregon.

The City of Portland does ordain as follows:

(Grantee—Franchise—Route.)

SECTION 1. That there be and hereby is granted, subject to the terms, restrictions, and provisions in this Ordinance contained, to Portland Railway Company, a corporation duly incorporated and existing under and by virtue of the laws of the State of Oregon, having its principal office and place of business at the City of  
861 Portland, in the County of Multnomah in said state, and its successors and assigns, the franchise, right and privilege to lay down, relay, construct, reconstruct, purchase, acquire, lease repair, maintain, equip, operate, either have, hold, use, and enjoy lines of railway and a system of railways, either single track or double track, with power to change from one to the other, with convenient switches, turn outs, cross overs, curves, connections, and turntables, and to run and operate cars thereon, in, over, along, and upon the following named streets and highways in the City of Portland, Oregon, to-wit: Upon Washington street (or Washington street and the Barnes road if Washington street does not extend that far west), from First street to a point three hundred feet west of the east line of the City Park, and upon Twenty-third street from Washington street to Thurman street and upon Thurman street from Sixteenth street to the western or northwestern end of Thurman street, and upon Thirteenth street from Washington street to Montgomery street, and upon Sixteenth street from Washington street to Thurman street, and upon Nineteenth street from Thurman street to Sherlock avenue, and upon Sherlock avenue from Nineteenth street to Nicolai street, and upon Irving street from Sixth street to Fifth street, and upon Fifth street from Irving street to Sherman street, and upon Sherman street from Fifth street to Second street, and upon Second street from Sherman street to Sheridan street, and upon Sheridan street from Second street to First street, and upon First street from Sheridan street to Porter street, and upon Porter street from First street to  
862 Corbett street, and upon Corbett street from Porter street to Grover street, and upon Grover street from Corbett street to Kelly street, and upon Kelly street from Grover street to the street, road, or highway known as the Macadam road, and upon Jefferson street from Fifth street to the western end of Jefferson street, and upon Chapman street from Jefferson Street to Elizabeth street, and upon Spring street from Chapman street to Twenty-

second street, and upon Ford street from Washington street to the south line of Jefferson street, and upon that certain street located between block numbered 56 and block numbered 59 in Carter's Addition to the City of Portland, from a point opposite the west line of lot numbered 24 in said block numbered 56 to the street or highway known as Market street drive, and upon said Market street drive from said street between said blocks numbered 56 and 59 to the street or highway known as Terrace road, and upon said Terrace road from said Market street drive to the connection of said Terrace road with Twentieth street, and upon Twentieth street from its connection with said Terrace road to a point seventy feet south of the south line of Spring street, and upon Elizabeth street from Chapman street to the Terrace drive, and upon the Terrace drive from Elizabeth street to Ravens View drive, and upon Ravens View drive from the Terrace road to the Patton road, and upon Twenty-fourth street from Thurman street to the street, road, or highway known as St. Helens road, and upon First street from Couch street to Jefferson street, and upon Burnside street from Washington street to the Willamette River, and upon East Burnside street from the Willamette river to East Tenth street, and upon Union avenue from East Burnside street to the north end of Union Avenue, and upon East Tenth street from East

863 Davis Street to East Pine Street, and upon East Pine Street from East Tenth Street to East Eighteenth Street, and upon East Eighteenth Street from East Pine Street to East Alder Street, and upon East Alder Street from East Eighteenth Street to East Twentieth Street, and upon East Twentieth Street from East Alder Street to East Salmon Street, and upon East Salmon Street from East Twentieth street to the eastern boundary line of the City of Portland, with the right to extend the same easterly upon East Salmon Street to the city boundary should the eastern boundary of the city be hereafter moved eastward, and upon Broadway Street from Union Avenue to East Nineteenth Street, and upon East Nineteenth Street from Broadway Street to Halsey Street, and upon Halsey Street from East Nineteenth Street to East Twenty second street, and upon East Twenty-second street from Halsey Street to Stanton Street, and upon Russell Street from Union Avenue to Gantenbein Avenue, and upon Gantenbein Avenue from Russell Street to Monroe Street, and upon Monroe street from Gantenbein Avenue to Commercial Street, and upon Commercial Street from Monroe Street to Shaver Street, and upon Shaver Street from Commercial street to Maryland Avenue, and upon Maryland Avenue from Shaver Street to the North line of North Albina Addition, and upon East Davis Street, from East Tenth Street to East Sixteenth Street, and upon East Sixteenth Street from East Davis Street to East Irving Street, and upon East Irving Street from East Sixteenth Street to the Sandy Road; And upon Alberta Street upon Union Avenue to the west line of the northeast quarter of section twenty three of township one north of range one east of the Willamette Meridian; and to connect together at street intersections by convenient curves, switches, turnouts, and connections all or any of the lines of railway in this section mentioned so as to conveniently operate the same as one entire system of rail-

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ways, and run cars from any line of track to any other line of track; and to connect together at street intersections by convenient curves switches, turnouts, and connections the lines of railway in this section mentioned and any other lines of railway in the City of Portland, and operate cars from one to the other; and to construct, maintain, and use convenient side tracks, switches, curves and turnouts from its lines of railway, maintained under authority of this Ordinance, to and upon its property and other rights of way and to and into its shops, barns, storehouses, repositories, depots, yards and terminal buildings and grounds and into the building upon lot 4 in block numbered 76 in East Portland; provided, that no track or tracks, or portion thereof, for entrance into its shops, barns, storehouses, repositories, depots or yards at Cedar Hill shall be constructed on Green Avenue within twenty four feet of the east line of Green Avenue.

\* \* \* \* \*

(Duration of Franchise—Compensation Last Five Years.)

SECTION 14. All rights, privileges and franchises granted to or conferred upon said Portland Railway Company, its successors and assigns, by this Ordinance, shall continue, exist and remain in force until and including the thirty-first day of December, A. D., one thousand nine hundred and thirty two (1932). Said Portland Railway Company, its successors and assigns shall pay to the City of Portland, in the manner provided in section 11 of this Ordinance, the sum of twelve thousand dollars (\$12,000.00) for each of 865 the last five years of the existence of the rights granted by this Ordinance, to-wit, the years 1928 to 1932 inclusive.

\* \* \* \* \*

Passed by the Common Council November 24, 1902.  
Approved November 25, 1902.

GEO. H. WILLIAMS, *Mayor*.

Approved by the Board of Public Works, November 25, 1902.  
Acceptance filed November 26, 1902.  
Acceptance of Ordinance No. 13178, filed January 14, 1903.  
Acceptance of Ordinance No. 13187, filed January 21, 1903.

Mr. FENTON: Ordinance No. 13177.

Objected to as incompetent, irrelevant and immaterial.  
Objection over-ruled; exception saved.  
Ordinance No. 13177 marked Complainant's Exhibit 4-A.

## COMPLAINANT'S EXHIBIT 4-A.

*Ordinance No. 13177.*

(Franchise Owned by City &amp; Suburban Railway Company.)

An Ordinance Granting to the City and Suburban Railway Company, its Successors and Assigns, the Right to Construct, Acquire, and Own, and to Maintain and Use Railways and Poles and Wires and Underground Conduits, Cables, and Conductors in the City of Portland, Oregon.

The City of Portland does ordain as follows:

(Grantee—Franchise—Route.)

SECTION 1. That there be and hereby is granted, subject to the terms, restrictions, and provisions in this Ordinance contained, to City and Suburban Railway Company, a corporation duly incorporated and existing under and by virtue of the laws of the State of Oregon, having its principal office and place of business at the City of Portland, in the County of Multnomah, in said state, and its successors and assigns, the franchise, right and privilege to lay down, relay, construct, reconstruct, purchase, acquire, lease, repair, maintain, equip, operate, have, hold, use, and enjoy lines of railway and a system of railways, either single track or double track, with power to change from one to the other, with convenient switches, turnouts, cross overs, curves, connections and turn tables, and to run and operate cars thereon, in, over, along and upon the following named streets and highways in the City of Portland, Oregon, to-wit: Upon Savier Street from Twenty-seventh Street to Fourteenth Street; and upon Fourteenth Street from Savier Street to Glisan Street; and upon Glisan Street from the Cornell Road to Third Street; and upon Twenty-first street from Glisan street to Northrup Street; and upon Northrup Street from Twenty-first street to Twenty-fifth street; and upon Twenty-fifth Street from Northrup Street to Raleigh Street; and upon Seventh Street from Glisan Street to Johnson street; and upon Third Street from Glisan Street to Sheridan Street; and upon Porter street from First Street to Front Street; and upon Flanders street from Third Street to First street; and upon First street from Flanders street to Whitaker street; and upon Grant Street from Third street to Front street; and upon Front street from Grant street to Gibbs street; and upon Gibbs street from Front street to Corbett street; and upon Corbett street from Gibbs street to Seymour Avenue; and upon Wisconsin street from Carolina street to Nebraska street; and upon and upon Nebraska street from Wisconsin street to Virginia street; and upon Virginia street from Nebraska street to Nevada street; and upon Second street from Flanders street to Grant street; and upon Nineteenth street from Glisan street to Mor-

rison street; and upon Morrison street from Nineteenth and Chapman streets to the Willamette river; and upon Yamhill street from Fourth street to Front street; and upon Front Street from Morrison street to Yamhill street; and upon Chapman street from Morrison street to Jefferson street; and upon Twenty-fourth street from Raleigh street to Thurman street; and upon Raleigh street from Twenty-third to Twenty-ninth street; and upon Eleventh street from Morrison street to Montgomery street; and upon Montgomery street from Eleventh street to Sixteenth street; and upon East Morrison street from East Twentieth street to the Willamette River; and upon Grant Avenue from Multnomah Street to Ellsworth street; and upon East Ankeby Street from Grand Avenue to East Twenty-eighth street; and upon East Twenty-eighth street from East Ankeny street to Weidler street; and upon Holladay Avenue from Grand Avenue to the Willamette River; and upon Multnomah street from Grand Avenue to East Fifteenth street; and upon East Fifteenth street from Multnomah street to Tillamook street; and upon Tillamook street from East Fifteenth street to East Nineteenth street; and upon East Davis street from Grand Avenue to East Ninth street; and upon East Ninth street from East Davis Street to East Glisan street; and upon East Glisan street from East Ninth street as it may be extended easterly, to East Twenty-eighth street; and upon A street from East Twenty-eighth street to the west line of T. Quinn donation land claim; and upon E street from East Twenty-eighth street, to Fulton street, and upon Fulton street from A street to E Street; and upon Williams Avenue throughout its entire length from Cherry street to the northern boundary of the city; and upon Quincy street from Cherry street to East First street; and upon East First street from Quincy street to Holladay Avenue; and upon Goldsmith street from Holladay avenue to Mississippi avenue; and upon Mississippi avenue from Goldsmith street to Prescott street; and upon Skidmore street from Mississippi avenue to Michigan avenue; and upon Michigan avenue from Skidmore street to Killingsworth avenue; and upon Dekum avenue from Williams avenue to Fern street; and upon Fern street from Dekum Avenue to Helm street; and upon Killingsworth avenue from Williams avenue to Greeley street; and upon Greeley street from Killingsworth avenue to Pippin street; and upon Pippin street from Greeley street to Wabash Avenue; and upon Dawson street from Huron street northerly to the city limits; and upon East Harrison street from Grand Avenue to East Twelfth street; and upon East Seventh street from East Harrison street to East Sherman street; and upon East Sherman street from East Seventh street to East Twelfth street; and upon East Twelfth street from East Harrison street to Clinton street; and upon Clinton street, as it may be extended, from East Twelfth street to the eastern boundary of the city; and upon East Twenty-first street from Powell street to Hood street; and upon East Twenty-sixth street from Clinton street to Powell street; and upon Kern street from East Twenty-sixth street to East Thirty-seventh street; and upon East Thirty-seventh street

869 from Kern street to Clinton street; and upon Ellsworth street from Grand Avenue to East Tenth street; and upon East Tenth Street from Ellsworth street to Brooklyn street; and upon Brooklyn street from East Tenth street to Powell street; and upon Powell street from Milwaukee street to East Twenty-first street; and upon Hood street from East Twenty-first street to East Twenty-second street; and upon East Twenty-second street from Hood street to Coquille street; and upon Coquille street from East Twenty-second street to Francis Avenue; and upon Francis Avenue from Bryant street to Tait street; and to connect together at street intersections by convenient curves, switches, turn outs and connections, all or any of the lines of railway in this section mentioned, so as to conveniently operate the same as one entire system of railways, and run cars from any line of track to any other line of track; and to connect together at street intersections by convenient curves, switches, turn outs and connections, the lines of railway in this section mentioned, and any other lines of railway in the City of Portland, and operate cars from one to the other; and to construct, maintain, and use convenient side tracks, switches, curves, and turn outs, from its lines of railway maintained under authority of this Ordinance, to and upon its property and other rights of way, and to and into its shops, barns, storehouses, repositories, depots, yards, and terminal buildings and grounds.

\* \* \* \* \*

(Duration of Franchise.)

SECTION 14. All rights, privileges and franchises granted to or conferred upon said City and Suburban Railway Company, its successors and assigns, by this Ordinance, shall continue, exist  
870 and remain in force until and including the thirty first day of December, A. D., one thousand nine hundred and thirty two (1932).

\* \* \* \* \*

Passed the Common Council January 9, 1903.

Approved January 13, 1903.

GEO. H. WILLIAMS, *Mayor*.

Approved by the Board of Public Works, January 14, 1903.

Acceptance filed, January 14, 1903.

871 Mr. FENTON: I offer Ordinance No. 6098.

Objected to as incompetent, irrelevant and immaterial.

Objection overruled; exception saved.

Ordinance No. 6098 marked Complainant's Exhibit 4B.

(From Compilation of 1895.

## COMPLAINANT'S EXHIBIT 4B.

*Ordinance No. 6098.*

An Ordinance Authorizing the Mt. Tabor Street Railroad Company, Their Successors or Assigns, to Construct, Maintain and Operate a Street Railway in the City of Portland, Multnomah County, State of Oregon.

The City of Portland does ordain as follows:

## Franchise—Route.

SEC. 1. That there be and hereby is granted unto the Mt. Tabor Street Railroad Company, their successors or assigns, the right and privilege to lay down, maintain and operate an iron or steel railroad track or tracks and to operate a street railway within the city of Portland, from and upon and over the following streets, to-wit: Beginning at the intersection of Madison street with Seventh and extending thence easterly along Madison street to the Willamette River, and for that purpose to erect necessary poles and stretch wires, subject, however, to regulation by the common council.

\* \* \* \* \*

## Duration of Franchise.

SEC. 15. All rights and privileges hereby conferred shall expire at the end of thirty years from the date of the approval of this ordinance.

Approved February 14, 1890.

872 Mr. FENTON: I offer ordinance No. 7574.  
(Compilation of 1895.)

Objected to as incompetent, irrelevant and immaterial.  
Objection overruled; exception saved.

Ordinance No. 7574 marked Complainant's Exhibit 4C.

## COMPLAINANT'S EXHIBIT 4C.

*Ordinance No. 7574.*

An Ordinance Granting to the Portland and Vancouver Railway Company the Right to Construct and Operate a Street Railway upon Certain Streets in the City of Portland.

The City of Portland does ordain as follows:

SEC. 1. That there be and is hereby granted unto the Portland and Vancouver Railway Company, its successors and assigns, the right and privilege to lay down, maintain and operate an iron or steel railway track or tracks and to operate a street railway within

the city of Portland, along, upon and over the following streets, to-wit:

Beginning at the intersection of Killingsworth Avenue with Union Avenue and extending easterly along said Killingsworth Avenue to the east boundary line of said city. Said street railway to connect with the line of said Portland and Vancouver Railway now constructed and operated over and upon said Union Avenue.

\* \* \* \* \*

#### Duration of Franchise.

SEC. 16. All rights and privileges hereby conferred shall expire at the end of thirty years from the 24th day of April, 1888.

Approved April 23, 1892.

873 Mr. FENTON: I offer Ordinance No. 7984.  
(Compilation of 1895.)

Objected to as incompetent, irrelevant and immaterial.

Objection overruled; exception saved.

Ordinance No. 7984 marked Complainant's Exhibit 4D.

#### COMPLAINANT'S EXHIBIT 4D.

#### *Ordinance No. 7984.*

An Ordinance Authorizing the City and West Portland Park *Park* Motor Company, its Successors and Assigns, to Construct, Maintain and Operate Street Railways on Certain Streets in the City of Portland, Multnomah County, State of Oregon.

The City of Portland does ordain as follows:

#### Franchise—Route.

SEC. 1. That there be and is hereby granted unto the City and West Portland Park Motor Company, its successors and assigns, the right and privilege to lay down, maintain and operate an iron or steel railroad track or tracks, and to operate a street railway within the city of Portland, along, upon and over the following streets, to-wit:

Commencing at the city boundary line, at the west end of Hamilton Avenue, running thence easterly along said Hamilton Avenue to Front street; thence northerly, following the center line of Front street to Whitaker street; thence west on Whitaker street to the center line of First street; provided, that nothing on this ordinance shall be construed to authorize the erection of poles or of any obstruction in any street in the city of Portland, between the curb lines thereof, except overhead wires which shall be subject to the approval of and regulation of the common council.

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\* \* \* \* \*



Under the city charter violation of an ordinance is punishable by fine in any sum not exceeding \$500, whereas under this Ordinance No. 16491, a fine cannot be imposed *less than \$250*, and besides, the said ordinance further provides for a punishment for each day's running or operating, or attempting to run or operate such steam locomotives or freight cars, and also in the conjunctive, imposes the further penalty of a forfeiture of all rights and privileges claimed by the Oregon Central Railroad Company with respect to the operation of said railway on said street. That is to say, Ordinance No. 16491 provides a punishment by fine of not less than \$250 nor more than \$500, or by imprisonment for not more than six months or by both such fine and imprisonment, *and a forfeiture of the rights and privileges claimed by the railway company.*

Under the authorities this ordinance is absolutely void, because it provides for a greater and different penalty than that authorized by charter. It cannot be claimed that this ordinance is void only as to the fine sought to be imposed, and valid as to the other punishment, because if the fine is eliminated then the ordinance would impose a greater penalty than allowed by the charter. That is to say, the municipal court could not punish a violation of this ordinance by a fine only, but would be compelled to imprison for a violation thereof for a term of not more than six months, and the imposing of such sentence would, under the terms and provisions of

the ordinance, work a forfeiture of all rights and privileges claimed by the said Oregon Central Railroad Company.

The portion of this ordinance in relation to the removal of freight cars from the street is so intimately interwoven and connected with that portion in relation to the operation of cars by steam, that they cannot be separated and stand. So in relation to the penalty. If it should be held that the penalty of the fine of not less than \$250 and not to exceed \$500 is void, such penalty could not be separated from the punishment by imprisonment, for the reason that such separation would make the punishment greater and different from that allowed by the charter. The rule is elementary that where a part of a by-law or ordinance is void, another essential and connected part of the same by-law or ordinance is also void.

Dillon on Municipal Corporations, Sec. 421  
and cases cited in the notes. (4th Ed.)

In conclusion, we submit that a franchise of a railroad to operate its trains on the streets of a city, when accepted and acted upon as in the case at bar, becomes an irrevocable contract and vested right, and cannot be divested except in some proceeding under the sovereign power of the state in the nature of condemnation proceedings, and then it cannot be taken away without compensation being paid therefor. A franchise cannot be taken or confiscated by a city under the guise of the police

power. Neither can the city deprive a railway company of its franchise under an ordinance declaring it a nuisance and permitting punishment therefor. A charter conferring upon a city the power to designate what shall constitute a nuisance, does not authorize it to declare a particular use of the property a nuisance which is not within the common law or statutory definition of nuisance. *Grossman v. City of Oakland*, 30 Or. 478; *Ex parte Wygant*, 39 Or. 429.

"Railroad corporations, and others invested with the power of eminent domain, because their business is of public utility, may be subjected to such regulations in regard to their charges and the conduct of their business as the legislature deems wise and proper for the general good. They may be compelled to adopt such appliances and execute such additions or changes in their works or property and take such precautions as are necessary to the public safety. Beyond this, private property cannot be interfered with under the police power, but resort must be had to the power of eminent domain and compensation made."

Lewis on Eminent Domain, Sec. 249 (3rd Ed.)

*Central Bridge Corp. v. City of Lowell*, 70 Mass. 480.

## ARGUMENT

### I.

It may be assumed that the material issues of facts alleged in the bill of complaint have been fully sustained by the evidence. We deny that any facts pleaded by the city, or proven under the evidence,

justify the adoption of Ordinance No. 16491, or that in the exercise of the police power, such ordinance could be legally enacted. The questions involved in the case at bar are therefore merely questions of law.

It is a sufficient answer to the contention of fact made by the city, that the operation of steam engines or freight trains over Fourth Street is a menace to the lives, health, and safety of the public, that the proof shows that there has not been during nearly forty years operation, a single casualty resulting from or occasioned by the presence of this railroad on Fourth Street. Two accidents resulting in personal injury have occurred, but in both cases they were caused by the drunken condition of the parties injured or killed. There have been a few slight collisions with vehicles or teams, resulting from the casual or careless collision of the owners or drivers of such vehicles, with passing engines or trains. The proof shows conclusively that thousands of pedestrians, and hundreds of teams, have passed and repassed over and along Fourth Street for nearly forty years, and it therefore cannot be said that the legislation sought to be justified is supported by any finding of fact that the operation of these trains, or of steam engines, is or was dangerous to the lives, safety or health of the public; nor can it be said that the proof shows that the operation of steam engines or freight trains is in any sense a nuisance on account of smoke, dust, or

noise. Indeed, if the operation of such locomotives or freight trains could by any possibility be declared by legislation to be a nuisance, that is not what has been attempted by the legislation sought to be enacted by the provisions of Ordinance No. 16491. It is apparent, and must be apparent to the court, that Ordinance No. 16491 is a clumsy attempt by the city, under delegated legislative authority under its present charter, to amend or repeal substantially the material portion of Ordinance No. 599, passed pursuant to the direct authority of the legislature as expressed by Sections 6841 and 6842, Lord's Oregon Laws, in effect since October 14, 1862. The attempt of the city to exercise its delegated legislative power in the passage of Ordinance No. 16491 is justified upon the alleged ground that Ordinance No. 599 is a revocable permit or license, and is not a franchise which is or could be irrevocable and perpetual; that it is not upon its face assignable, and that it could only inure to the benefit of the Oregon Central Railroad Company during the pleasure of the city, and that its successor and vendee, the Oregon & California Railroad Company, and the lessee of that company, the Southern Pacific Company, could not in any way acquire any right under the provisions of Ordinance No. 599. These contentions, as we hope to show, are all, and each of them is, untenable.

Preliminary to the discussion of the first question, it may be observed that Ordinance No. 16491 recog-

nizes on its face the right to operate steam locomotives and freight cars on Fourth Street, between Glisan Street and the southerly limits of the City of Portland, at the time of its passage, and for eighteen months thereafter. By Section 1 it is expressly provided:

"It shall be unlawful for the Oregon Central Railroad Company of Portland, Oregon, its successors, assigns, or their *lessees* \* \* \* to run or operate steam locomotives or freight cars over, upon or along Fourth Street, \* \* \* from and after eighteen months from the final passage or approval of this ordinance, excepting freight cars for the reconstruction, repair or maintenance of the railway lawfully and rightfully on said street."

By Section 2, it is provided:

"Any violation of the provisions of this ordinance by the owners, officers, agents, or employes of said Oregon Central Railroad Company, or its successors, assigns, or *lessees*, \* \* \* by so running or operating steam locomotives or freight cars \* \* \* or attempting to run or operate the same on said Fourth Street, shall be punishable by fine. \* \*"

Thus by the first and second sections of this ordinance the city recognizes that the operation of steam locomotives and freight trains on Fourth Street was lawful on that date, and would be for eighteen months thereafter; that the Oregon Central Railroad Company was in existence, and had successors and assigns, and lessees, who were operating steam locomotives and freight cars over Fourth Street,



and would be so operating the same lawfully for eighteen months thereafter, and that the ordinance attempts by Sections 2, to denounce a penalty against the officers, employes and agents of the Oregon Central Railroad Company, or its successors, assigns or lessees.

It is thus manifest, notwithstanding the provisions of Section 3, that the city, by this ordinance, has expressly recognized the assignability of the franchise or right granted by Ordinance No. 599, and the right of Southern Pacific Company, as lessee, in succession to the same. In addition to this affirmative recognition contained upon the face of the repealing ordinance, the proof shows to a demonstration that the Oregon Central Railroad Company accepted the terms and provisions of Ordinance No. 599, made the improvements required by its terms, and that since October 6, 1880, when the Oregon & California Railroad Company succeeded to the property of the Oregon Central Railroad Company, under authority to dissolve the latter company and dispose of its assets, conferred by Sections 5068, 5070, Bellinger & Cotton's Annotated Code, and up to July 1, 1887, continuously operated the railroad over and along Fourth Street, renewed and rebuilt the same, and repaired the street, as required by this ordinance, and was recognized by the city, by ordinance and otherwise, and that since July 1, 1887, the Southern Pacific Company has continuously, under its lease, operated this railroad on

Fourth Street, made the improvements required by Ordinance No. 599, and has been recognized by the City of Portland in every possible way, by ordinance, by assessment and taxation, and by requiring of the Southern Pacific Company full performance of all the terms and conditions of this ordinance, and by the enactment of other ordinances for its benefit, referring to and connected with and in recognition of the rights and obligations created under Ordinance No. 599.

It will be remembered, also, from an examination of the repealing ordinance, that it not only prohibits the operation of steam locomotives *at any time, under any circumstances*, but it *prohibits the movement of freight cars over or upon Fourth Street*, and thereby, if valid, deprives the railroad company of an opportunity to perform its duty as a common carrier of freight, or to use the motive power in question *at any time or place*, over Fourth Street, and prohibits the movement of any train, including passenger trains, by the use of steam locomotives and *does not offer by the terms of such ordinance, any substitute motive power, or confer any right upon the company to transact its business in any way upon said street*. It is not a regulation, nor is it claimed to be a regulation or a limitation of the time or times when steam locomotives might be operated over this street, or when freight trains might be moved in the usual course of the business of the carrier. Nor does the ordinance attempt to

forfeit or declare a forfeiture of the rights and privileges granted by Ordinance No. 599, and, *as a consequence of such forfeiture*, attempt to require the removal of the railroad from the street.

It is not claimed that under the provisions of Section 3, of Ordinance No. 599, that the city, under Ordinance No. 16491, has attempted to make or alter any regulations for the conduct of the road, or to regulate the speed of the railway cars or locomotives, nor is it claimed by this repealing ordinance that the city has attempted to "restrict or prohibit the running of locomotives at such time and in such manner as the city may deem necessary;" but the city asserts, by the ordinance in question, that it may prohibit the running of locomotives and freight trains *at all times, and absolutely.*

It is of course elementary that Ordinance No. 16491, attempting as it does, to prohibit the movement of freight trains at all, and to prohibit the use of steam locomotives at all times, must be read as an entirety, and that the whole of the ordinance must stand or fall; a part of it cannot be considered valid, and a part invalid, because it is impossible to separate its terms or provisions.

With this full general statement of the issues, both of law and of fact, we proceed with the discussion of the legal principles involved.

The Oregon Central Railroad Company was incorporated November 20, 1866, and its Articles filed in

the office of the County Clerk of Multnomah County, Oregon, November 23, 1866, and its duration is unlimited. (Pages 249-251 Transcript) At the time of its incorporation the charter of the City of Portland then in effect was the Act of October 14, 1864, (Pages 64-88 Transcript) which did not confer any power or authority upon the Common Council in respect to railroads in streets, and the power in that respect was dependent upon the provisions of Sections 24 and 25 of the Act of October 14, 1862, now Sections 6841 and 6842 Lord's Oregon Laws. Page 6 Transcript) This was the condition of the law on January 6, 1869, when the Oregon Central Railroad Company attempted to bring itself within the provisions of the state statute, and when the City of Portland attempted to consent to the exercise of that power by the railroad company.

On October 6, 1880, when the Oregon Central Railroad Company conveyed to the Oregon & California Railroad Company all of its property of every kind and nature, including its rights under the provisions of the state law, as evidenced by Ordinance No. 599, in respect to the use of this street, Sections 5068 and 5070 of Bellinger & Cotton's Code were as follows:

*"Section 5068.* All corporations that expire by limitation specified in their Articles of Incorporation, or are dissolved by virtue of the provisions of Section 5070, or are annulled by forfeiture or other cause by the judgment of a court, continue to exist as bodies corporate for a period of five years thereafter, if necessary for the purpose of prosecuting or defending

actions, suits, or proceedings by or against them, settling their business, disposing of their property, and dividing their capital stock, but not for the purpose of continuing their corporate business."

"*Section 5070.* Any corporation organized under the provisions of this chapter may, at any meeting of the stockholders, which is called for such purpose, by a vote of the majority of the stock of such corporation, increase or diminish its capital stock or the amount of the shares thereof, or authorize the dissolution of such corporation, and the settling of its business and disposing of its property, and dividing its capital stock in any manner it may see proper."

Section 5068 was Section 17 of the Act of October 14, 1862, and Section 5070 was Section 19 thereof.

Under this state of the law it is clear that the City of Portland, under its charter of January 23, 1903, in effect when Ordinance No. 16491 was passed, had no power or authority to amend, modify or repeal the rights granted under the Act of the Legislative Assembly of October 14, 1862, and particularly under the provisions of Sections 24 and 25 thereof, being now Sections 6841 and 6842 of Lord's Oregon Laws, *supra*. An examination of these sections shows clearly that the Legislative Assembly undertook to grant to railroad companies the absolute and unqualified right on the part of such railroad companies, to appropriate any part of any public street, wheresoever situated, whether within or without the corporate limits of a municipal corporation, and granted plenary power to the municipal corporation to agree with the railroad company

upon the extent, terms and conditions upon which such street might be appropriated or used and occupied, and in case such parties should be unable to agree, the legislature granted, unconditionally, to such railroad company, authority to appropriate so much of such street as might be necessary and convenient in the location and construction of the road.

This was a direct exercise of the legislative authority having primary and sovereign control of the streets and highways of the state, in behalf of an enlarged public use of such street for public purposes, such as the exercise of the functions of a railroad company in the carriage of freight and passengers in the performance of its public duties required, and it is apparent that such right when exercised by the railroad company, became a vested property or contract right, to continue as long as the public functions of such carrier should be exercised, either by the carrier directly, or by its assigns or lessees, under the provisions of law permitting such railroad company to dispose of its railroad to another railroad company, either by dissolution of such corporation and the sale of its property, under Sections 5068 and 5070 of Bellinger & Cotton's Code, *supra*, or the leasing of its railroad and property pursuant to Subdivision 7, of Section 6686, Lord's Oregon Laws, under which Southern Pacific Company was authorized to accept a lease of the railroad and properties of the Oregon & California Railroad Company.



It is fundamental that control of streets and highways, whether within or without the limits of a municipal corporation, is in the state, represented by the legislature.

"The legislature of the state represents the public at large, and has, in the absence of special constitutional restraint, and subject (according to the tendency of more recent judicial opinion) to certain private and property rights and easements of the abutting owner, full and paramount authority over all public ways and public places."

3 Dillon on Municipal Corp. Sec. 1122, 5th Ed.

"By virtue of its authority over public ways, the legislature may authorize acts to be done in and upon them, or legalize obstructions therein, which would otherwise be deemed nuisances. As familiar instances of this may be mentioned the authority to railway, water, telegraph, and gas companies to use or occupy streets and highways for their respective purposes."

3 Dillon on Municipal Corp. Sec. 1128, 5th Ed.

"As the highways of a state, including streets in cities, are under the paramount and primary control of the legislature, and as all municipal powers are derived from the legislature, it follows that the authority of municipalities over streets, and the uses to which they may legitimately be put, depends, within constitutional limitations, entirely upon their charters or the legislative enactments applicable to them."

3 Dillon on Municipal Corp. Sec. 1161, 5th Ed.

This legislative power, under a state statute such as Sections 6841 and 6842 Lord's Oregon Laws, *supra*, is the exclusive act of the state, notwith-

standing the statute may require or permit the municipality to consent to the exercise of such right. Under Section 6842 the right *was made absolute even though the city or municipality might refuse to give its consent*. Such consent, therefore, when given, is merely in furtherance of the legislative grant, and when once exercised, cannot be recalled, modified or withdrawn. This is particularly true where, as here, the consent was not necessary.

"Although the franchise or right to use the streets of a city is derived from the state acting through the legislature, the consent of the municipality *when required by constitution or by statute* must be obtained before the right to exercise the franchise is complete."

3 Dillon on Municipal Corp. Sec. 1226, 5th Ed.

"No particular mode of manifesting the municipal consent to the construction of a railroad or other public utility in the city streets is prescribed by the usual constitutional provision, and in such case it has been said that so far as the Constitution is concerned, such consent may be either express or implied. And it has also been held that the consent of the municipality required by statute may be presumed where the streets of the municipality have been used for a long period of years by the company under such circumstances as to amount to a claim of the right to use them."

3 Dillon on Municipal Corp. Sec. 1227, 5th Ed.

"Although the legislature may be prohibited by constitutional provisions from authorizing the construction of a street railroad, or telegraph or telephone line, or other structures in the streets for the public service, without the consent of the municipality, the franchise or

right to use the streets therefor flows from the State, and not from the municipality. A constitutional requirement that no street railroad, telegraph or telephone line, or other public utility, shall be constructed within the limits of any city without the consent of the local authorities, is *not a grant of authority* to the municipality to create and grant franchises in streets. It is a restriction on the legislature only, and the municipality still requires legislative authority to enable it to make an effective grant or to give its consent."

3 Dillon on Municipal Corp. Sec. 1228, 5th Ed.

"But it is apparent that there is a limit to, or qualification of the character of, the conditions which may be imposed by the municipality. Although the statute or constitutional provision may simply require the consent of the municipality, it is usual to give that consent in the form of an ordinance containing stipulations and conditions; and such ordinance with its stipulations and conditions becomes a part of the contract under which the right to use the street arises. These conditions and stipulations may be of such a nature as to operate as a restriction or qualification of the powers of the municipality as well as a qualification or restriction of the right granted. So viewed, such conditions or restrictions must not infringe certain fundamental principles of municipal law. Thus, it has been recognized that conditions attached by the municipality may be unlawful because they require the performance of a forbidden act, or because they wholly transcend the scope of the authority conferred upon the municipality; and it has been held that the municipality has not the power, in giving its consent to the construction of a street railroad, to contract away or limit the taxing or police powers of the legislature. Some

courts have gone further and have limited the power of the municipality to attach conditions to its consent to such conditions as materially affect, or relate to the powers of government which are conferred upon the municipality by its charter, or by statute. And in those jurisdictions in which a limit to the power of the municipality to attach conditions is recognized, the attempt to impose an unlawful or invalid condition is regarded as a mere nullity, and the validity of the consent or franchise is not affected thereby."

3 Dillon on Municipal Corp. 5th Ed. Sec. 1229.

"When the legislature has regulated the terms and conditions upon which the streets of the municipality may be used by a railroad or other public service corporation, the city council or other officials charged with the duty of giving municipal consent to the construction of the public utility *cannot impose other or different conditions* which are inconsistent with those prescribed by the legislature."

3 Dillon on Municipal Corp. 5th Ed. Sec. 1230.

This is particularly true where, as here, the authority to construct a railroad under the Articles of Incorporation of the Oregon Central Railroad Company was granted by the state, and where, as here, that railroad had its northern terminus at the north end of Fourth Street, at its intersection with Glisan Street, and its southern terminus, by way of Fourth Street to Sheridan Street, where Fourth Street ends, and thence over private right of way acquired by the company by condemnation or purchase, to a point at or near McMinnville, on the

Yamhill River; and where, as here, this railroad, under the Act of Congress of May 4, 1870, (16 Statutes at Large, 94) is performing certain public functions devolved upon it by Congress, and where, under the state statute as well as under the Act of Congress and the Articles of Incorporation, this railroad presumably must be operated in perpetuity.

It was the legislative intent, as expressed by the provisions of Sections 6841 and 6842 Lord's Oregon Laws, to encourage the building of railroads, and to that end to grant to railroad companies the right to appropriate any part of any public street within the limits of a municipal corporation, and legislative authority was granted by which such municipal corporation—it may be conceded—was authorized to agree with the railroad company upon the extent, terms and conditions upon which any street might be appropriated, used, or occupied, and if such parties could not agree on the extent, terms and conditions upon which the street might be appropriated, used or occupied, then the railroad company could appropriate so much of such street as might be necessary and convenient in the location and construction of the road. It was obligatory upon the railroad company to locate its road upon such street within the corporate limits as the local authorities having charge thereof should designate, but if such local authorities, in this instance the Common Council, should fail or refuse to make such designation within a reasonable time, when

requested, the railroad company might make such appropriation without reference to the local authorities. It was the clear legislative intent that the appropriation of so much of any street within the corporate limits as might be necessary or convenient, should be easily and quickly effected, and that the local authorities either could agree with the railroad company upon the extent, terms and conditions of such use, or could, when requested by the railroad company, designate the street upon which the railroad should be located, and if such local authorities should fail or refuse to make such designation within a reasonable time, when requested, the railroad company might make such appropriation without action upon the part of the Common Council.

In this instance it will be presumed that the railroad company requested the Common Council to designate the street, and to state the extent, terms and conditions upon which Fourth Street could be used, appropriated or occupied, and that Ordinance No. 599, when accepted by the railroad company, became a contract or agreement between the state and the railroad company, acting by and through the Common Council, pursuant to legislative authority. Thereafter the Common Council had no power to impose any other conditions or terms, or to repeal or modify the conditions or terms as expressed in Ordinance No. 599.

It may be conceded that this contract thus evi-



denced does not deprive the state of its right, in the exercise of its police power, directly or indirectly, through the Common Council, under a delegated authority, to enact reasonable regulations under which the rights evidenced by the contract could be exercised by the railroad company. But no exercise of such police power could impair, modify or destroy the special terms of the agreement, and the Legislative Assembly could not, by subsequent legislation, delegate to the city authority to repeal, amend or modify the terms of this agreement. And therefore the provisions of the charter of the City of Portland, enacted by the Legislative Assembly of the State of Oregon on January 23, 1903, and particularly Section 103 of this charter, (Pages 12, 431, 432, 433 Transcript) could not confer power upon the City of Portland to abrogate, annul or modify the rights granted to the railroad company under the state statute, Sections 6841 and 6842 Lord's Oregon Laws, evidenced by the passage of Ordinance No. 599.

In *Abbott et al. v. City of Duluth*, 104 Fed. 833, the court, speaking of a legislative grant to a telephone company, accepted by it, to construct, operate and maintain a telephone line, and to erect poles therefor in the streets of a city, says:

"The rights and powers granted thereby became contract rights in the company as fully as if the amendment had been enacted and in force when the company was organized and incorporated. These rights and powers, being

unlimited in respect to duration, were valuable property rights, not merged nor excluded by the special acts referred to, which granted in addition the exclusive monopoly of occupying the streets, etc. of Duluth, and later of West Duluth, with telephone poles and wires for a limited time. This monopoly, which was the only real grant made by the special acts, ceased with the lapse of the prescribed time; but the unlimited right to occupy the highways of the city remains and continues. The acceptance by the company of the special exclusive rights granted by the special acts for a fixed time, and presumably of value, cannot be construed as a refusal, disclaimer, or surrender of the rights and powers granted to and vested in the company by the general law."

In that case it was contended that although the company had obtained a grant under *a state statute, unlimited in time*, the acceptance of further grants under special statutes, where the rights granted were limited in time, was a waiver of the rights vested in the company under the general statute, and that the special acts would operate to repeal by implication, the general statute upon that subject. This case is to the point, as to the assignability of the contract rights created under the state statute, the perpetuity thereof, and that subsequent special statutes cannot impair or modify or repeal the right granted in the first instance, under the general law.

In *Sunset Telephone & Telegraph Co. v. City of Pomona*, 172 Fed. 829, 837, the court says:

"Taking section 536 of the Civil Code of California as originally enacted as including telephone as well as telegraph companies, as

we think must be done in view of the decisions of the Supreme Court of the state to which reference has been made, it cannot be doubted that the erection by the appellant of its poles and wires in Pomona in the year 1889, and their maintenance and operation, was an acceptance by it of the provisions of that statute, which thereby became a contract between the company and the state, secured by the Constitution of the United States against impairment by any subsequent state legislation."

City of Columbus v. Street Ry. Co., 137 Fed. 869, 873

City of Wichita v. Old Colony Trust Co., 132 Fed. 641, 645

In State ex rel Wisconsin Tel. Co. v. City of Sheboygan, 111 Wis. 23, 35, the court says:

"The city had no power to add to or detract from it except in the exercise of its police power. The franchise existed by express legislative grant. Its exercise might be controlled only *in recognition of its existence*, and in conformity with a just and reasonable administration of the police power in the interest of the city and its inhabitants. In a sense, the city was called upon to grant a privilege. It had the power to regulate the use of its streets. It might deem it improper to allow poles to be set along some of the streets included in the proposed extensions. It might designate other streets, and thus exercise a reasonable discretion in the interests of its people. But such privilege was controllable only in harmony with the rights both possessed. In no proper sense was the privilege sought a franchise, within the meaning of Section 940b. The consent of the city was only required or asked in view of its right to regulate."

This was stated in a case where, as here, the state statute granted to the telephone company the right to use the streets, and where the state statute expressly provided that no such line should at any time obstruct or incommode the public use of the particular highway.

Wisconsin Tel. Co. v. City of Oshkosh, 62  
Wis. 32

In Township of Summit v. N. Y. & N. J. Tel. Co.,  
57 N. J. Eq. 123, 127, the court says:

"The right to the use of the streets has been expressly granted by the legislature, and the power to prohibit or interdict this use so granted cannot be inferred from the declaration in the proviso annexed to the grant that the use should be subject to such regulations and restrictions as may be imposed. The restrictions intended in such a proviso must be held to be restrictions in the nature of regulations, and not restrictions which shall prohibit the use or impose new conditions to the power to exercise the franchise. A power to 'regulate and control' the driving of cattle in streets does not give power to prevent it altogether. *McConvill v. Jersey City*, 10 Vr. 38, 44 (Supreme Court, 1876). Such power of prohibition, or of imposing conditions upon which the franchise should be exercised at all, was not vested in the township authorities by the statute, nor can the township committee, by its own ordinance, confer upon itself this power or the absolute right of previous consent. An ordinance imposing a new condition upon which the telephone company may use its franchise in or over the public streets, granted by the legislature, is an entirely different thing from an ordinance regulating and restricting

the manner of erection and use in or over the streets. The effect of such ordinance is to interdict the enjoyment by the company of its franchise except upon terms and conditions which the legislature, in its charter, has not imposed. \* \* \* \* \*

"The right of the company to the use of the streets for the mere suspension of wires over them, is based on the authority expressly given by the legislature to use the highways for erecting poles to sustain wires, and on the consent of the owner of the soil; and this use is not, by the statute, made subject to the mere discretion of the municipal authorities. They can only regulate and restrict it by reasonable regulations."

In *New Hope Tel. Co. v. City of Concordia*, 106 Pac. Rep. 35, the Supreme Court of Kansas expresses the true rule as follows:

"Repeals by implication are not favored, and as these acts taken together, admit of a construction that the state had directly granted telephone companies the right to build over the streets of cities subject to such reasonable regulation as the council may prescribe, that construction should be adopted. No company should undertake to enter a city and erect poles and string wires over or along streets, alleys, or public grounds, without making application and a proper effort to procure the passage of an ordinance defining the manner and place of construction of the contemplated lines. Such an application the council may not deny. It may regulate, but not exclude. The telephone companies get the right directly from the state, and not from the city. The city may prescribe terms and conditions upon which the right granted by the state shall be exercised, but it



has no power to annul the right granted by the higher authority," citing many cases.

In *Telephone Company v. City of St. Joseph*, 121 Mich. 502, 509, the court says:

"When the construction company and the complainant accepted the privileges granted to them by the laws of the state, and the municipality had duly given its permission, and the corporations had expended their money in valuable improvements, contracts were entered into which neither the state nor the municipality could impair or destroy, in the absence of power to do so being reserved in the grant itself, or in the constitution, which becomes a part of all such contracts. The constitution and the statute clothe municipalities with power to control their streets and alleys, and protect them from things injurious and dangerous to the public; hence they have the power to make all reasonable rules and regulations for erection and maintenance of poles and wires for telegraph and telephone companies. Here their power in the matter ceases. \* \* \*

"The question is not, as counsel for the defendant state, the right to regulate the use of its public streets. This right is conceded by the complainant, and in the petitions it presented to its common council. The action of the council is practically prohibitive of the use of the streets. The defendant city, by its act of incorporation, obtained no other or greater rights or control over the complainant than the village had over it and its assignor. Both, under the police power inherent in municipalities, possessed the right of reasonable regulation."

*Michigan Tel. Co. v. City of Benton Harbor*,  
121 Mich. 512



In *Village of Carthage v. Central N. Y. Tel. Co.*, 185 N. Y. 448, 452, the court says:

"The legislature having granted these corporations the right to construct and maintain their lines upon, over or under any public roads, streets and highways, it sought to confer upon the boards of trustees of villages the power to regulate the erection of telegraph, telephone or electric light poles, or the stringing of wires, in, over or upon the streets, etc. it is clear that the intention of the legislature was to permit villages to regulate the erection of telegraph, telephone or electric light poles and the stringing of wires on these poles. The right to erect these poles and string the wires is not derived from the village authorities, but they are permitted to regulate the erection of the same; that is to say, the location of the poles and the streets to be occupied are, doubtless, within the reasonable power of the village to regulate."

And so under the provisions of Sections 6841 and 6842 Lord's Oregon Laws, *supra*; the state granted the right to the railroad company to appropriate so much of Fourth Street as may be necessary and convenient in the location and construction of the road, and this right could be exercised by the railroad company without the consent of the municipality, but when exercised, the municipality, whether it consented to the location or not, could, under the police power, reasonably regulate the use of such street by the railroad company, but it could not materially impair or destroy that use under the guise of reasonable regulation, or under the pretense that it was within the police power.

Judicial expression of this rule is well stated in *Northwestern Tel. Exchange Co. v. City of Minneapolis*, 81 Minn. 140, 146, where the court says:

"That the effect of the first ordinance, and the acceptance and expenditures of large sums of money by plaintiff in reliance thereon, established such contractual rights between the parties, we have no right to question, either upon principle or authority. An ordinance of a municipality, surrendering a part of its powers to a corporation to secure and encourage works of improvement, which require the outlay of money and labor, to subserve the public interests of its citizens, when accepted and acted upon, becomes a contract between the city and the corporation which relied upon it, and the grantee cannot be arbitrarily deprived of the rights thus secured. It is protected by the organic law which forbids the impairment of contracts or interference with vested rights without due process of law. *Cincinnati v. Smith*, 29 Oh. St. 291; *Chicago v. Sheldon*, 9 Wall. 50; *New Orleans Waterworks Co. v. Rivers*, 115 U. S. 674, 6 Sup. Ct. 273; *City Ry. Co. v. Citizens' St. R. Co.*, 166 U. S. 557, 567, 17 Sup. Ct. 653; *Cincinnati v. Village*, 36 Oh. St. 631, 634; *City v. Great Southern*, 40 La. An. 41, 3 South. 533; *City v. Burlington*, 49 Iowa, 144; *Com. v. City*, 97 Mass. 555; *City v. Wheeler*, 88 Wis. 607, 60 N. W. 818; *City of St. Paul v. Chicago, M. & St. P. Ry. Co.*, 63 Minn. 330, 63 N. W. 267, 65 N. W. 649, 68 N. W. 458. These are but a few of the many authorities which clearly enunciate the rule above stated, the reason for which is founded upon the most obvious principles of justice, as well as sound policy and public necessity; for no one would invest his money to further any plan of improvement for his own as well as the general benefit if the rights

to the advantages which he as its promoter expects to derive from its success might be destroyed by the uncertain or capricious inclinations of the governing body of the municipality."

In *Mayor etc. of Knoxville v. Africa*, 77 Fed. Rep. 501, 507, Lurton, Circuit Judge, speaking for the Circuit Court of Appeals, Sixth Circuit, aptly says:

"Under the well-settled law of Tennessee the power to grant to a public corporation a right of way for the operation of public railroads, commercial or street, on or over a particular street or public highway, resides primarily in the legislature of the state, but may be delegated to municipal governments. *Railroad Co. v. Adams*, 3 Head, 598; *Railroad Co. v. Bingham*, 87 Tenn. 522, 11 S. W. 705; *Dill. Mun. Corp. Secs.* 519-521. The restrictions imposed by the amendments to the constitution adopted in 1870, whereby the legislature is required to provide for the organization of corporations by general law only, would perhaps prevent the granting of a particular right of way to a particular corporation, as was done in the charter construed in *Railroad Co. v. Adams*, 3 Head, 598. A right of way upon a public street, whether granted by act of the legislature, or ordinance of city council, or in any other valid mode, is an easement, and as such is a property right, capable of assignment, sale, and mortgage, and entitled to all the constitutional protection afforded other property rights and contracts. *City of Detroit v. Detroit Citizens' St. Ry. Co.*, 22 U. S. App. 570, 12 C. C. A. 365, and 64 Fed. 628; *Louisville Trust & Banking Co. v. City of Cincinnati* (decided at present term) 76 Fed. 296."

*Detroit Citizens' St. Ry. Co. v. City of Detroit*, 64 Fed. 628

In *Citizens' St. Ry. Co. v. City Ry. Co.*, 56 Fed. 746, the court says:

"Assuming the truth of the facts alleged in the bill, as we must, for the purpose of this motion, there can be no doubt that the rights, privileges and franchises granted to the defendant impair the rights, privileges and franchises previously granted to the complainant, nor is there any doubt that the grant of rights, privileges and immunities to the complainant, coupled with its acceptance, and the expenditure of large sums of money on the faith thereof, constitute a contract protected by section 10 of Article 1 of the constitution. So it was held in the case of *Western Paving Co. v. Citizens' St. R. Co.*, 128 Ind. 525, 26 N. E. Rep. 188, and 28 N. E. Rep. 88, in which the ordinances in question were considered by the supreme court of the state, and were adjudged to constitute a contract between the city and the complainant. Since the decision in the case of *Dartmouth College v. Woodward*, 4 Wheat. 518, it is no longer open to debate that where rights, privileges, and immunities are lawfully granted to and accepted by a private or quasi public corporation, and money or its equivalent is expended on the faith of such grant, a binding contract is thereby created, whose violation by a law of the state is forbidden by section 10 of Article 1 of the constitution of the United States."

*Mercantile Tr. & Dep. Co. v. Collins Park Co.*, 99 Fed. 812, 816.

In *City of Kansas v. Corrigan*, 86 Mo. 67, 70, the court says:

"The results flowing from this ordinance and its acceptance was the creation of a contract by and between the city and the accepting company, which contract the city could not,

by any subsequent ordinance, affect or impair. The city, under the terms of the contract-creating ordinance, might compel the company to keep and maintain the specified portions of the street 'in good repair' but beyond this the city authorities could not go, nor the company be compelled to do or perform."

Springfield Ry. Co. v. City of Springfield, 85 Mo. 674, 676

East Louisiana Ry. Co. v. City of New Orleans, 46 La. Ann. 526

In *City of Burlington v. Burlington St. Ry. Co.* 49 Iowa, 144, 147, the court says:

"The ordinance as adopted gave the defendant authority to lay the double track in controversy in this case. Under this ordinance the defendant expended large sums in the construction of its railway. The ordinance constitutes a contract whereby defendant is secured in the exercise of the powers conferred therein. If it had not this effect defendant would have no security that its property would not be destroyed by unfriendly legislation by the city council. The law will secure to defendant the exercise of all the powers conferred by the ordinance. The city cannot, without the consent of the defendant, change the terms of the contract entered into by the ordinance, nor abrogate or nullify it. The amendment, therefore, which attempts to take from defendant the right to lay a double track cannot have the effect intended, and will deprive defendant of no right guaranteed by the original ordinance.

Nor, as we have seen, is this statement of the rule inconsistent with the opinion of this court as expressed in *Baltimore v. Baltimore Trust & Guarantee Co.*, 166 U. S. 673. See also



City of Des Moines v. Chicago, R. I. & Pac. Ry., 41 Iowa, 569, 573

City of Indianapolis v. Con. Gas. Trust Co., 140 Ind. 107

Western Paving etc. Co. v. Citizens' St. R. Co., 128 Ind. 525, 529

Village of London Mills v. White, 208 Ill. 289, 298

In Wright v. Milwaukee Elect. Ry. & L. Co., 95 Wis. 29, 35, the court says:

"The ordinance, when accepted and acted upon by the grantee, becomes also a contract between the public, acting through the city council, on the one hand, and the railway company, on the other; the consideration for the partial surrender of the street being the advantages to the public arising from inexpensive and rapid transit, and the assumption by the company of the duty of continuing to furnish such transit during the life of the ordinance. But the right under consideration is something more than an easement, and more than a mere contract right. It is also a franchise granted by the state, acting through the common council of the city, to the railroad company. It becomes, when owned by a corporation, one of its corporate franchises, for failure to exercise which an action may be brought by the attorney general, in the name of the state, to vacate its charter, under sec. 3241, R. S. 1878. This was held in the case of State ex rel Att'y Gen. v. Madison St. R. Co., 72 Wis. 612, and has been affirmed in principle in numerous later decisions. Ashland v. Wheeler, 88 Wis. 607; State ex rel Milwaukee St. R. Co. v. Anderson, 90 Wis. 550; State ex rel Att'y Gen v. Janesville W. Co. 92 Wis. 496.

"By the acceptance of the terms of the ordinance, the railroad company assumed a public



trust. It undertook to serve the public, by affording it rapid transit; and it became its duty to continue that service, not simply because it had contracted so to do, but because it had become charged with such duty by legislative grant. It could not lay down the burden when it chose, nor emancipate itself by merely ceasing to operate its cars."

In *Western Union Tel. Co. v. Visalia*, 149 Cal. 744, 750, the court says:

"While the appellant had the right, of which the city could not deprive it, to construct and operate its lines along the streets of the city, nevertheless it could not maintain its poles and wires in such a manner as to unreasonably obstruct and interfere with ordinary travel; and the city had the authority, under its police power, to so regulate the manner of plaintiff's placing and maintaining its poles and wires as to prevent unreasonable obstruction of travel. And we think that the ordinance in question was not intended to be anything more, and is nothing more, than the exercise of this authority to regulate. But such regulation is not the granting of a franchise; it is a restriction of and burden upon a franchise already existing; it is not an original and affirmative granting of anything in the nature of a franchise. Indeed, the ordinance and its acceptance by plaintiff—which acceptance was necessary to give it any effect—was in the nature of a contract between the parties."

And so in the case at bar, under the provisions of Ordinance No. 599 evidencing the legislative grant, it was within the competency of the Common Council, in the exercise of its police power, and in the exercise of the express provisions of Section 3 of

the Ordinance, to make or to alter regulations at any time for the conduct of the road within the limits of the city, and to regulate the speed of railway cars and locomotives within such limits, and whether the ordinance is construed to be a contract, or whether the right to regulate arises under the police power, this ordinance expressly provided that the Common Council might restrict or prohibit the running of locomotives, not absolutely and altogether, but at such times and in such manner as the Council might deem necessary.

Nor can it be said that by the Act of January 23, 1903, (the present charter of the City of Portland) the legislative intent was to amend; modify or repeal the state statute contained in Sections 6841 and 6842 Lord's Oregon Laws, or to confer upon the Common Council, under the charter of the City of Portland, authority to amend, modify or repeal Ordinance No. 599, or to impair any rights granted to the railroad company under the provisions of the state statute.

Under the provisions of the Act of January 23, 1903, (Pages 12, 431, 432, 433 Transcript) the Council is given power and authority by ordinance to agree with any corporation, firm, or person constructing a commercial railroad, and desiring to enter the city, upon the extent, terms and conditions upon which the streets, alleys or public grounds of the city may be appropriated, used, or occupied by such railroad, and upon the manner,

terms and conditions under which the cars and locomotives of such railroad may be run over and upon such streets, alleys and public grounds, such corporation to be subject to the provisions and regulations of Sections 95, 97, 100 and 101 of that charter. (See page 12 Transcript) These provisions and this charter were clearly applicable to future obligations, and were not retroactive, even if they could be construed to be retroactive and as intending to repeal the provisions of the state statute, supra, and the rights evidenced by Ordinance No. 599. The provisions of Section 106 of this charter expressly negative any such conclusion. Section 106 reads as follows:

"All franchises or privileges heretofore granted by the city, which are not in actual use or enjoyment, or which the grantees thereof have not in good faith commenced to exercise, are hereby declared forfeited and of no validity, unless said grantees or their assigns shall, within six months after this charter takes effect, in good faith, commence the exercise or enjoyment of such grant or franchise. Nothing in this charter contained shall affect the validity of any franchise, right, or privilege in actual use or enjoyment heretofore given or granted by any former or the present City of Portland, or by the City of East Portland, or by the City of Albina, and the same shall be and continue in force and effect as given or granted by said cities or either of them."

Furthermore, it is a fundamental rule that repeals by implication are not favored.

"It is a sound and reasonable principle of

very extensive operation that affirmative statutes of a general nature do not repeal by implication charters and special acts passed for the benefit of particular municipalities, but they do so when this clearly appears to have been the purpose of the legislature. If both the general and the special acts can stand, they will be construed accordingly. If one must give way, it will depend upon the supposed intention of the law-maker, to be collected from the entire legislation, whether the charter is superseded by the general statute, or whether the special charter provisions apply to the municipality, in exclusion of the general enactments. So particular provisions of charters should be read and construed in the light of the whole instrument, of all preceding charters, of the general legislation of the state, and of the object of the legislature in the erection of municipalities, as before explained."

1 Dillon on Municipal Corp. 5th Ed. Sec. 235

To the same effect is the current of judicial opinion.

City of Louisville v. Louisville Water Co., 105 Ky. 754

3 Elliott on Railroads, 2nd Ed. Sec. 1076

Detroit Citizens St. Ry. Co. v. City of Detroit, 64 Fed. 628

Wright v. Nagel, 101 U. S. 791

Eichels et al. v. Evansville St. Ry., 78 Ind. 261, 263

Chicago, R. I. & P. Ry. Co. v. City of Joliet, 79 Fed. 25

Hudson Tel. Co. v. City of New Jersey, 49 N. J. L. 303

State v. Noyes, 47 Me. 189

Rio Grande Ry. Co. v. City of Brownsville, 45 Tex. 88

McQuaid v. Portland & Van. Ry. Co., 18 Or.  
237

Pacquet v. Mt. Tabor St. Ry. Co., 18 Or.  
233.

In the two cases last cited the Supreme Court of Oregon had occasion to construe in a general way the effect of the state statute, Sections 6841 and 6842 Lord's Oregon Laws, *supra*.

It is unnecessary to review at further length the authorities cited under Point I. They are, however, conclusive to the point that the rights of the railroad company in this case depend in the first instance upon a legislative grant as authorized by Sections 6841 and 6842 Lord's Oregon Laws, *supra*, and that these rights, when evidenced by municipal action designating the street, or expressing the terms and conditions upon which the street may be appropriated, constitute a contract which cannot be subsequently impaired, modified or repealed by legislative action; that the power of the municipality is restricted to the power reserved in the ordinance, or, at most, to the right in the exercise of the police power, to prescribe reasonable rules and regulations by which the railroad company may enjoy the rights granted; and that it is not within the power of the state or of the municipality, under the guise of an exercise of the police power, to destroy that use, and that the state or municipality, in the exercise of the rights reserved by the terms of the ordinance, or in the exercise of the police power, may reasonably regulate the use of the rights granted.



## II.

Whether the rights created under the provisions of Sections 6841 and 6842 Lord's Oregon Laws, evidenced by the enactment of Ordinance No. 599, are deemed to be granted directly by the state, under the state statute, or are created by the enactment of Ordinance No. 599, and the acceptance of that ordinance by the railroad company, is only material for the purpose of determining the extent of the power and authority of the City of Portland under its charter of January 23, 1903. In either case, as matter of law, the Common Council has no power to repeal, amend, or modify this ordinance. The rights thereby created or evidenced constitute a franchise or contract which cannot be altered, impaired or repealed, and these rights when accepted by the grantee, became a vested property right which could be assigned, conveyed, mortgaged, sold, leased, or otherwise disposed of in the same manner and for the same purposes as any other property of this kind.

In *City of Rushville v. Rushville Nat. Gas. Co.*, 164 Ind. 162, 165, the court says:

"The acceptance by appellee of the privileges granted by appellant in this ordinance constituted a contract equally binding upon both parties, and when acted upon rights became vested, and its provisions became secure against impairment by any subsequent municipal action."

See also note to this case annotated in 3 Am. & Eng. Ann. Cases, 86, 88.



Even in the state of Illinois, where a grant of this kind by a municipality is deemed a license and not a franchise, the rule is settled that when the license has been accepted, it becomes a binding contract between the city and company, which cannot be revoked or rescinded, except for cause.

People v. Central Union Tel. Co., 192 Ill. 307, 311

Chicago Tel. Co. v. Northwestern Tel. Co., 199 Ill. 324, 347

3 Dillon on Municipal Corp. 5th Ed. Secs. 1210, 1222, 1242

"A legislative grant of the right to use the city streets for a public service upon condition of the performance of the service by the grantee, when accepted and acted upon by the grantee, is a contract between the grantee and the state, which is protected by the constitution of the United States, and which cannot be impaired by subsequent state legislation. When the grant of the right to so use the streets flows from the act of the municipality, similar principles apply. The municipality acts by virtue of delegated authority from the legislature, and as the representative or agent of the state for that purpose. Hence, an ordinance of a city, made pursuant to legislative authority, granting the right to use the streets of the city for a railroad, or for gas or water mains and pipes, or for electric poles, wires, or conduits, or for any other recognized public service, is, when accepted and acted upon by the grantee, a contract within the protection of the Federal Constitution, and new conditions cannot, in the absence of a reserved power, be imposed on the exercise of the right granted, except, as we shall hereafter see, so far as these conditions may be authorized by the exercise of the police power."

3 Dillon on Municipal Corp. 5th Ed. Sec.  
1242

In town of Mason v. Railroad Co., 51 W. Va.  
183, 186, the court says:

"In our day the railroads are a prime necessity for transportation and inter-communication. They must pass by towns and cities where heavy population and business imperiously demand their presence. In most, or in many instances, they must pass through the streets. So must the public pass along the same streets. It follows of necessity that both the people and the railroad must use these streets in common. Each must give and take. It is very well settled that a railroad may be lawfully constructed upon, or across a street, with the consent of the town or city, upon the terms specified by statute, and the terms which the municipal authorities may see fit to incorporate in the grant. When such a grant is made by a municipality, it is a binding contract between it and the railroad company, which may not be abrogated by the municipality."

See also Vicksburg v. Vicksburg Water-  
works Co. 202 U. S. 453

City of Louisville v. Cumberland Tel. Co.  
224 U. S. 649

Mr. Justice Lamar, in the case last cited, speaking for the court says:

"But in 1886, when the Ohio Valley Telephone Company was chartered, the legislature not only had the sole right to create corporations and to grant franchises but, without municipal consent, it could have authorized the company to use any and all streets in the city of Louisville. Instead, however, of exercising this plenary power, the charter de-

clared that the company might maintain its telephone system, erect poles and string wires over the streets and highways of the city, with and by the consent of the General Council. These provisions of the charter gave the municipality ample authority to deal with the subject, and by virtue of this statutory power it could have imposed terms, which the company might have been unable or unwilling to accept—in which event the franchise granted by the state would have been nugatory. But, when the assent was given the condition precedent had been performed, the franchise was perfected and could not thereafter be abrogated by municipal action. For, while the city was given the authority to consent, *the statute did not confer upon it the power to withdraw that consent*, and no attempt was made to reserve such a right in the collateral contract contained in those provisions of the ordinance relating to the company's giving a bond and carrying the police and fire wires free of charge. If those or other terms of this independent and separate contract had been broken by the Ohio Valley Company or its successors, the city would have had its cause of action. But the municipality could not by an ordinance impair that contract nor revoke the rights conferred. Those charter franchises had become fully operative when the city's consent was given, and thereafter the company occupied the streets and conducted its business, not under a license from the city of Louisville, but by virtue of a grant from the State of Kentucky. Such franchises granted by the legislature could not, of course, be repealed, nullified or forfeited by any ordinance of a General Council."

In *Detroit v. Detroit Citizens' St. R. Co.*, 184 U. S. 368, 386, 396, the court says:

"In *City Railway Company v. Citizens' St. R. Co.*, 166 U. S. 557, the common council of Indianapolis, on January 18, 1864, adopted an ordinance which said: 'Consent, permission and authority are hereby given, granted to and duly vested in the company organized with R. B. Catherwood as president, a body politic and corporate by the name of the Citizens' Street Railway of Indianapolis, and their successors, to lay a single or double track for passenger railway lines,' etc., under which ordinance the railway was built. This court said, page 567: 'The original ordinance of January 18, 1864, was plainly a proposition on the part of the city to grant to the company the use of its streets for thirty years, in consideration that the company lay its tracks and operate a railway thereon upon certain conditions prescribed by the ordinance. This proposition, when accepted by the company and the road built and operated as specified, became a contract which the state was not at liberty to impair during its continuance; but if, at the expiration of the thirty years, the road had been sold to another company, and that company had applied for and obtained from the common council a franchise to occupy its streets for another period, it seems to be clear that such a contract would need no other consideration to support it than the continued operation of the road under such conditions as the city chose to impose.' \* \* \*

"We have already seen that the legislature was competent to grant to the city of Detroit the right to give its consent to the laying of the tracks of a street railway and the operation of the same in and through its streets upon such terms and conditions as the parties might

agree upon. The grant of this power was not the formation of a municipal corporation, directly or indirectly, either in substance or effect. The legislative act which granted the power to the city could not be altered, amended or repealed by the latter. No such power was given to it by the legislature and probably could not even be delegated in any event. It is sufficient to say that none was attempted. *City Railway Company v. Citizens' Railway Company*, 166 U. S. 557, 563."

The rule is well expressed in *Hot Springs Electric Light Co. v. Hot Springs*, 70 Ark., 300, 303, where the court says:

"Now a grant which has been accepted and acted upon by the grantee is a contract, within the meaning of the constitution of the United States, which forbids laws impairing the obligation of contracts. When, therefore, rights and franchises lawfully granted to either a person or corporation have been duly accepted, and valuable improvements have been made on the faith of such grant, it becomes, in effect, a contract, which cannot be impaired either by a law of the state or by an ordinance of a municipality. The rights and franchises granted can then neither be revoked, nor can they be diminished in value by the imposition of additional burdens upon their use and enjoyment. *Fletcher v. Peck*, 6 Cranch (U. S.) 87; *Dartmouth College v. Woodward*, 4 Wheat. (U. S.) 518; *New Orleans Gas Co. v. Louisiana Light Co.*, 115 U. S. 650; *New Orleans Water Works Co. v. Rivers*, 115 U. S. 674; *Sioux City St. R. Co. v. Sioux City*, 138 U. S. 98; *St. Louis v. Western Union Tel. Co.* 148 U. S. 92; *Burlington v. Burlington St. Ry. Co.*, 49 Iowa, 144; 2 Beach, Contracts, Sec. 1205; 3 Parsons on Contracts, (8th Ed.) 479; 15 Am. & Eng. Enc. Law (2d Ed.), 1049."



- Blair v. City of Chicago, 201 U. S. 400  
 Cleveland v. Cleveland Electric R. Co., 201  
 U. S. 529  
 Los Angeles v. Los Angeles City Water Co.,  
 177 U. S. 558  
 Chicago v. Sheldon, 9 Wall. 50, 55  
 Vicksburg Water Works Co. v. Vicksburg,  
 185 U. S. 65  
 City of Minneapolis v. Minneapolis St. R.  
 Co., 215 U. S. 417  
 Greenwood v. Freight Co., 105 U. S. 13, 21  
 H. J. & C. Traction Co. v. H. & L. E. Trac.  
 Co., 69 Ohio St. 402, 410  
 Mayor etc. v. Houston St. Ry. Co., 83 Tex.  
 548, 555

It is unnecessary to review the authorities at length as to whether or not the property rights granted to the Oregon Central Railroad Company are assignable without words of assignability expressed in the ordinance. In view of the fact that it is the policy of the state that commercial railroads having authority to construct their lines between termini, one of which may originate in another state, or beyond the corporate limits of a municipality, within the same state, and the other of which may be within the corporate limits of a large city, may, under the provisions of Section 6841 and 6842 Lord's Oregon Laws, *supra*, locate and construct and operate their lines of railroad on any street of any city to be designated by the municipal authorities, if such municipal authorities are willing to act, and to be appropriated notwithstanding the refusal of such municipal authorities to act; and in view of the fact that under the statute which



authorizes the incorporation of the Oregon Central Railroad Company, its charter was and could be perpetual; and in further view of the fact that the provisions of Sections 6679, 6680, 6683 Lord's Oregon Laws, were in effect when the Oregon Central Railroad Company was incorporated; and in view of the provisions of Sections 5068, 5070 Bellinger & Cotton's Code, which authorize the dissolution of a railroad company and the disposition and sale of its assets, it is settled that such franchise or private rights evidenced by Ordinance No. 599 were the subject of sale and transfer by the Oregon Central Railroad Company to the Oregon & California Railroad Company. This is recognized by the authorities cited by us under Point II.

In *Louisville v. Cumberland Telephone Co.*, 224 U. S. 649, 660, Mr. Justice Lamar, speaking for the court, says:

"It is not necessary to determine whether that amendment was intended to supply an omission, remove a doubt or to ratify the transfer and use under this and prior mergers. *City Railway Co. v. Citizens' R. Co.*, 166 U. S. 557, 569. For while *franchises to be* are not transferable without express authority, there are *other franchises to have, to hold and to use*, which are contractual and proprietary in their nature and which confer rights and privileges, which can be sold wherever the company, as here, has power to dispose of its property. In the present case the Ohio Valley Company was by its charter given authority to mortgage and dispose of franchises. Among those thus held was the right to use the streets in the city for the purpose necessary in conducting a telephone

business. Such a street franchise has been called by various names,—an incorporeal hereditament, an interest in land, an easement, a right of way,—but, howsoever designated, it is property. *Detroit v. Detroit St. Ry.*, 184 U. S. 368, 394; *Louisville City Ry. v. Louisville*, 71 Ky. (8 Bush), 534; *West River Bridge v. Dix*, 6 How. 507, 534; *Board of Morristown v. East Tenn. Tel. Co.*, 115 Fed. Rep. 304, 307."

The assignability of this franchise or property right, evidenced by Ordinance No. 599, and the ownership of the Oregon & California Railroad Company, and its right to lease the same to the Southern Pacific Company as the operating company, and the continuance of all the rights evidenced by Ordinance No. 599, is recognized, ratified and confirmed by Section 106 of the charter of the City of Portland, approved January 23, 1903, which reads:

"All franchises or privileges heretofore granted by the city, which are not in actual use or enjoyment, or which the grantees thereof have not in good faith commenced to exercise, are hereby declared forfeited and of no validity, unless said grantees or *their assigns* shall, within six months after this charter takes effect, in good faith, commence the exercise or enjoyment of such grant or franchise. Nothing in this charter contained shall affect the validity of any franchise, right or privilege in *actual use or enjoyment* heretofore given or granted by any former or the present city of Portland, or by the City of East Portland, or by the City of Albina, and the same shall be and continue in force and effect as *given or granted by said cities or either of them.*" (Page 13 Transcript)

The principle that a property right created by a franchise or ordinance, is assignable, is well expressed in *New Orleans etc. Railroad Co. v. Delaware*, 114 U. S. 501, 507, where the court says:

"The ground upon which this view of the defendant is based is that the franchises of a railroad corporation are inalienable in Louisiana. In passing upon this question it is necessary to bear in mind the distinction between the different classes of railroad franchises. This was stated by Mr. Justice Curtis in the case of *Hall v. Sullivan Railroad Co.*, 21 Law Reporter, 138, S. C., 2 Redfield Am. Railway Cas. 621; 1 Brunner, 613, where he said: 'The franchise to be a corporation is therefore not a subject of sale and transfer unless the law by some positive provision made it so and pointed out the modes in which such sale and transfer may be effected. But the franchises to build, own and manage a railroad and to take tolls thereon are not necessarily corporate rights. They are capable of existing in and being enjoyed by natural persons, and there is nothing in their nature inconsistent with their being assignable.'

"The same subject was considered by this court in the case of *Morgan v. Louisiana*, 93 U. S. 217, 223, where it was held that exemption from taxation was a right personal to the railroad corporation to which it was granted, and did not pass upon a sale of its property and franchises. Mr. Justice Field, who delivered the opinion of the court, distinguished such an immunity from taxation from those rights, privileges and immunities which, accurately speaking, are the franchises of a railroad company. He said: 'The franchises of a railroad corporation are rights or privileges which are essential to the operations of the corporation, and without which its road and works would

be of little value. \* \* \* They are positive rights or privileges, without the possession of which the road of the company could not be successfully worked. Immunity from taxation is not one of them. The former may be conveyed to a purchaser of the road as part of the property of the company; the latter is personal and incapable of transfer without express statutory direction.'

"We are of the opinion that those franchises which in the case just cited are described as necessary to the use and enjoyment of the property of a railroad company are assignable in Louisiana, and that there is no warrant in the jurisprudence of that state for holding the contrary.

"That the quality of being transferable attaches to such franchises of a railroad as are essential to its use and enjoyment by the company is conclusively shown by Section 2396 Rev. Stat. Louisiana, Act of 1856, page 205, which was in force when the first Canal Street, City Park and Lake Railroad Company was organized, and has been in force ever since. That section provides as follows: 'In addition to the powers conferred by law upon railroad companies, any railroad company established under the laws of this state may borrow, from time to time, such sum of money as may be required for the construction or repairs of any railroad, and for this purpose may issue bonds, or their obligations secured by mortgage, upon the franchises and all the property of said companies.'

"The authority to mortgage the franchises of a railroad company necessarily implies the power to bring the franchises so mortgaged to sale, and to transfer them with the corporeal property of the company to the purchaser. It could not be held that when a mortgage on a railroad and its franchises was authorized by

law, that the attempt of the mortgagor to enforce the mortgage would destroy the main value of the property by the destruction of its franchises.

"Since the passage of the act of 1856, the Supreme Court of Louisiana has recognized the validity of the transfer to individuals of those rights and franchises of a railroad company without which the road could not be successfully used.

"In the case of *Chaffe v. Ludeling*, 27 La. Ann. 607, it was declared that the defendants, by their purchase at sheriff's sale of the property of the Vicksburg, Shreveport and Texas Railroad Company, a Louisiana corporation, acquired 'the privileges and franchises of the corporation, its powers to operate the railroad. The sheriff's sale made them the owners of the road, its right of way, its property, its franchise, but did not and could not make them a corporation. \* \* \* This sale conveyed to them the rights and property of that company; it made them joint owners thereof.'

"There is, therefore, nothing in the nature of a corporate franchise under the law of Louisiana which forbids its transfer with the other property of the corporation. And such must be the conclusion whenever a railroad company is authorized by law to mortgage its tangible property and franchises. When there has been a judicial sale of railroad property under a mortgage authorized by law, covering its franchises, it is now well settled that the franchises necessary to the use and enjoyment of the railroad passed to the purchasers. This was assumed to be the law by the opinion of this court pronounced by Mr. Justice Matthews in the case of *Memphis Railroad Co. v. Commissioners*, 112 U. S. 609, 619, where it was said: 'The franchise of being a corporation need not be implied as necessary to secure to the mortgage



bondholders or the purchasers at a foreclosure sale the substantial rights intended to be secured. They acquire the ownership of the railroad and the property incident to it and the franchise of maintaining and operating it as such.' See also *Hall v. Sullivan Railroad Co.*, above cited; *Galveston Railroad v. Cowdrey*, 11 Wall. 459.

"It follows that if the franchises of a railroad corporation essential to the use of its road, and other tangible property, can by law be mortgaged to secure its debts, the surrender of its property, upon the bankruptcy of the company, carries the franchises, and they may be sold and passed to the purchaser at the bankruptcy sale."

### III.

It was not within the police power of the City of Portland to enact a valid ordinance containing the terms and provisions of Ordinance No. 16491. Such ordinance was not a reasonable exercise of the police power of the city, or of the state. The Council cannot, under the police power, by mere legislative fiat, declare an act to be a nuisance, or assume it to be a nuisance, and abate a lawful act, without judicial review, or opportunity for judicial review, on questions of fact. The use and operation of steam locomotives is not per se a nuisance, nor an injury to the public; nor can it be shown to be an injury in any sense, to the public.

Neither is Ordinance No. 16491, as held by the court below, a regulation within the police power of the state. It is not a regulation of the exercise of the rights evidenced by Ordinance No. 599. On the



contrary, it is a prohibition of the use of steam locomotives at any time, whether day or night, and it is a denial of the right to exercise and enjoy the necessary valuable privilege and duty of operating freight trains at any time on this street.

It will be noticed that Ordinance No. 16491, (Pages 8 and 9 Transcript) makes it unlawful for the Oregon Central Railroad Company of Portland, Oregon, its successors, assigns, or their lessees, (recognizing the assignability of the right and franchise to operate trains on Fourth Street, and recognizing the right of complainant to operate trains, as lessee) to run or operate steam locomotives or freight cars over the same after eighteen months from May 1, 1907, excepting freight cars for reconstruction, repair or maintenance of the railway lawfully and rightfully on said street. It will thus be seen that by Section 1, the Council recognizes that the railway is lawfully and rightfully on the street; that the Oregon Central Railroad Company could assign such right, and that the same could be leased, and that it was lawful to operate steam locomotives and freight cars for a period of eighteen months after May 1, 1907. By Section 2, it is provided that any violation of the provisions of the ordinance by the owners, officers, agents, or employees of the Oregon Central Railroad Company, or its successors, assigns, or lessees, etc., by so running or operating steam locomotives or freight cars, or attempting to run or operate same on said Fourth Street, after the

time mentioned, should be punishable as stated, and that such violation should be deemed a forfeiture of any and all rights and privileges claimed by said Oregon Central Railroad Company with respect to the operation of any railway on said street. It is true that under Section 3 of this ordinance the Council attempts to say that Ordinance No. 16491 should not be construed to recognize, assent to, affirm, confirm, ratify or extend any right, franchise or privilege relative to the maintenance or operation of any railway, etc., but it is manifest that such attempted provision is, in the face of the affirmative provisions of Sections 1 and 2, void.

"The basis of the exercise of the police power is the protection of human life and the promotion of public convenience and welfare. Municipal regulations not having a fair relation to these objects are unreasonable, but when they fairly tend to promote these objects they are generally sustained."

3 Dillon on Municipal Corp. 5th Ed. Sec. 1270

"It is a general rule that the right to exercise the police power cannot be alienated, surrendered, or abridged, either by the legislature or by the municipality acting under legislative authority, by any grant, contract, or delegation, because it constitutes the exercise of a governmental function without which the state would become powerless to protect the public welfare. Hence, when a franchise or privilege is granted to use the city streets for a public service, the grantee accepts the right upon the implied condition that it shall be held subject to the reasonable and necessary exercise of the police powers of the state, operating either through legislative enactment or municipal action. But these franchises are property which cannot be

destroyed or taken from the grantee or rendered useless by the arbitrary act of the municipal authorities in preventing the grantee from using the city streets for the purposes of the grant, although the municipality may seek to justify such act as an exercise of the police power. *Therefore, any regulations adopted by virtue of the exercise of the police power must be such as are called for by a fair consideration of the public welfare, must be reasonable in their character, and must not be such as to defeat the purpose of the grant. The franchise or privilege being founded upon a grant from the state, the municipal authorities cannot by virtue of the police power impose any conditions upon the exercise of the right granted which are inconsistent with the franchise or privilege granted.*"

3 Dillon on Municipal Corp. 5th Ed. Sec. 1269

In *City of Belleville v. Turnpike Co.*, 234 Ill. 428, 437, the court says:

"Police power has been defined by this court as that inherent plenary power in the state which permits it to prohibit all things hurtful to the comfort, welfare and safety of society. It is 'co-extensive with self protection, and is not inaptly termed "the law of overruling necessity."' (*Town of Lake View v. Rose Hill Cemetery Co.*, 70 Ill. 191.) While the police power of the state can be used to promote the health, comfort, safety and welfare of the city and is very broad and far reaching, it is not without its restrictions. (*Ritchie v. People*, 155 Ill. 98) It must not conflict with the constitution, and must have some relation to and be adapted to the ends sought to be accomplished. Rights of property will not be permitted to be invaded under the guise of police regulation. (*Bailey v. People*, 190 Ill.

28) The legislature may determine when the exigency exists for the exercise of the police power, but it is for the courts to determine what are the subjects of police powers and what are reasonable regulations thereunder. (People v. Steele, 231 Ill. 340; Booth v. People, 186 id. 43) Has appellee taken possession of this turnpike to enable it to promote the health, comfort, safety or welfare of society? \* \* \*

"Nothing is disclosed on this record either as to the increase of population, topography of the ground, or any other reason in connection with the health, safety or comfort of the community, that will furnish any reasonable argument for taking the appellant's property, without paying therefor, through the present annexation of territory. This court, in *City of Chicago v. O'Brien*, 111 Ill. 532, speaking through Mr. Justice Scholfield, said (p. 536): 'Even the police power, comprehensive as it is, has some limitations. It cannot be held to sanction the taking of private property for public use without making just compensation therefor, however essential this might be, for the time, to the public health, safety, etc.'"

In *Chicago, Burlington & Quincy R. Co. v. People*, 200 U. S. 561, this court held that even to promote the public health, public morals, or public safety, property could not be taken without compensation, for public use, under the police regulation, any more than it could when it bore no relation to such matters, but only to the general welfare; that the foundations of the police power were the same in every case.

So in the case at bar, under a state statute granting to the railroad company an absolute right



to use this street, whether the municipality gave its consent or not, the terms of the ordinance expressly provide that consent, as here, under Ordinance No. 599, became a contract and limited the power of the state to the exercise of its police power directly, or through the instrumentality of the municipality, to the adoption of reasonable regulations which should be calculated *to protect and preserve the use of that street by the railroad company*. Such use could be regulated in a *reasonable way*, and while under some peculiar and particular circumstances, as in the case of Railroad Co. v. Richmond, 96 U. S. 521, the use of steam locomotives may be forbidden, in the exercise of the police power, and in the absence of vested rights granted under a settled policy of the state, yet where such prohibition is exercised under an ordinance expressive of the said right, which on its face limits the right to prohibit the operation of steam locomotives entirely, and defines the measure of that right as one of regulation, instead of prohibition, it is clear that in the absence of state action, and in the absence of judicial determination, that the operation of steam locomotives is a nuisance upon a city street, that it is not competent, under the police power, to do more than regulate the time or manner of the further operation of steam locomotives. If the Common Council had declared that such steam locomotives could only be moved at such a rate of speed, or that steam locomotives using a particular kind

of fuel only, could be used, or that such steam locomotives could only be operated on this street between certain hours of the night, such exercise of the police power could have been sustained, both under the terms of Ordinance No. 599, and under the general authority. Such exercise would be a regulation, and would not deprive the railroad company of the enjoyment of its property, or of the use contemplated by its public functions. When this prohibition, absolute in terms, is coupled with a proviso that freight trains or freight cars shall not be moved over, upon or along the street at all, excepting freight cars for reconstruction, repair or maintenance of the railroad, it operates to deprive the railroad company of its chief function and usefulness, and destroys its right to carry freight of any kind, whether mail, baggage, express, or ordinary freight. It is a denial of the right of the railroad company to exercise a privilege and perform a duty which on the one hand, it enjoys, and on the other hand, owes to the state. It would have been a reasonable regulation under the police power, perhaps, if the city, by a proper ordinance, had limited the time when freight trains or freight cars could be moved over Fourth Street. Whether the ordinance would, or would not be reasonable in this respect, would depend upon whether it was destructive of the public functions of the railroad company, and so far destroyed its right and obligation in that respect, as to impair its contract rights and destroy the per-



formance of its public functions under its charter, and under the laws of the state.

Ordinance No. 16491 not only attempts to make unlawful the operation of steam locomotives *at any time*, but makes it unlawful to *move freight cars* on this street, and for a violation of the mandatory provision of the ordinance, in addition to imposing severe penalties upon the officers, agents, or employes of the company, attempts to forfeit any and all rights and privileges of the railroad company on account of and when any such violation occurs. This is a legislative declaration attempting to deprive the railroad company of its property rights without trial. It is clearly not within the power of the Council to declare the operation of this railroad a nuisance, without judicial investigation or inquiry.

Ex parte Wygant, 39 Or. 429, 432  
Grossman v. City of Oakland, 30 Or. 478;  
36 L. R. A. 593, note

The court cannot say, as matter of law, that the operation of a steam locomotive, or the operation of a freight car, on a city street, is in and of itself injurious to the public health, the public morals, or the public safety. Whether it is so, is a judicial and not a legislative question.

#### IV.

The City of Portland has ratified the assignment of this franchise and the rights of complainant therein, and is estopped from claiming that such

franchise was not assignable and that complainant has no rights thereunder. Furthermore, by Section 106 of the act of January 23, 1903, now in effect, *supra*, the City of Portland ratified and confirmed Ordinance No. 599 and recognized and ratified its continuance in force and effect as originally granted.

In *Port of Mobile v. Louisville & Nashville R. R. Co.* 84 Ala. 115-119, the Court says:

"Upon the faith of this grant the track of the road was constructed through Commerce Street, with the necessary sidings and turn-outs, for the purpose of loading and unloading freight and merchandise into and from the various stores and warehouses located upon said street; and has been ever since continuously used for this purpose from day to day, without complaint or objection from any source, for a period of seventeen or eighteen years, until the attempted revocation of the ordinance in December, 1886.

"The privilege thus granted is obviously a franchise of the most valuable kind—being one of the most common examples of such a grant or privilege.—*Davis v. Mayor*, 67 Amer. Dec. 186, 193. It is certainly a 'right, privilege or franchise' within the meaning of the company's charter, having reference, as it does, to the construction and management of the railroad, and the conduct of its business of transportation within the limits of the City of Mobile. Such a special privilege conferred directly by legislative enactment, or in a mode provided for by such enactment, becomes a contract between the State and the corporators, and, as such, has always been protected from impairment by legislative ac-

tion by virtue of both the Federal and State constitutions, each of which prohibits the passage of any law by which the obligation of existing contracts is impaired or lessened.

"The privilege in question is none the less a franchise, in the proper sense of that term, because it was granted, not directly by legislative enactment, but by the municipal authorities of Mobile under the sanction of the charter, which is itself a legislative enactment. The grant by the city without such sanction would be unauthorized by law and void.

"The right to lay a track through a street implies by necessary implication the right to use such a track in the mode ordinarily adopted by railroad companies, and subject to reasonable regulation under the police power of the proper authorities. The right to lay side tracks and turn-outs, in like manner, implies the right to use them, and the only use which could be reasonably contemplated by their construction is for the transportation of goods to and from the adjoining stores and warehouses. Add to this the significant fact that the railroad company, after being placed in possession of its franchise, construed it to confer this right, and exercised it uniformly without complaint or interruption for between seventeen and eighteen years. A contemporaneous construction of a law is of very high authority. The practical exercise of a right under it, acquiesced in by the public, and not denied by those adversely interested, is the strongest evidence that it has been rightly interpreted. The practical construction thus established by years of uniform usage is often allowed by the courts, even in doubtful cases, to have the force of settled law. A like rule prevails in the construction of contracts, the

court being always strongly inclined to interpret every agreement as the parties themselves have done by practical usage, regarding their conduct in the everyday execution of its terms as an agreed interpretation of them.

"Our conclusion is that the railroad company was possessed of an irrevocable franchise, conferred by the city ordinance, giving it the right to load and unload freight at its sidings and turn-outs, constructed on Commerce street, subject to the limitation only that the use of the street by the public should not be unnecessarily or materially impaired."

In *C. R. I. & P. R. R. Co. v. City of Joliet*, 79 Ill. 25, the Court says:

"From all these positive acts of recognition on the part of the city of Joliet of the right claimed by the railroad company, and long acquiescence in its exercise, there must be held to be an estoppel *in pais* against the city, if that principle be applicable at all to municipal corporations, as respects public rights.

"In *Goodwin v. The City of Milwaukee*, 24 Wis., it was distinctly held that the doctrine of estoppel *in pais* was applicable to a municipal corporation in respect of a matter of public right.

"We think there is sufficient warrant of authority for the application of the principle of an equitable estoppel to a case of the character disclosed by this record, and that it should be applied here.

"As to the ordinance of the common council of the city of Joliet, of September, 1872, declaring the railroad a nuisance, we regard that as without effect upon the case, although the charter of the city confers upon the com-

mon council the power to abate and remove nuisances, and to punish the authors thereof, and to define and declare what shall be deemed nuisances. We will, in this respect, but refer to the language of the Supreme Court of the United States in *Yates v. Milwaukee*, 10 Wall. 505: 'It is a doctrine not to be tolerated in this country, that a municipal corporation, without any general laws, either of the city or the State, within which a given structure can be shown to be a nuisance, can, by its mere declaration that it is one, subject it to removal by any person supposed to be aggrieved, or even by the city itself. This would place every house, every business, and all the property of the city, at the uncontrolled will of the temporary local authorities.' And see *State v. Jersey City*, 5 Dutch. 170.

"Some stress is laid upon a certain proviso in the ordinance of the common council, of January 3, 1853, before referred to, which is as follows: 'Provided, that said railroad company shall be subject to all laws and ordinances that may hereafter be passed to regulate railroads in the city.' That only means, that the company should be subject to all reasonable and legal ordinances for the regulation of the road. It had no such scope, that the railroad company should abandon or take up and remove its track at the bidding of the common council."

The case last cited is particularly in point as to that portion of Ordinance 1649, *supra*, which attempts to forfeit the rights of the company for an alleged violation of the provisions of the ordinance. Property rights cannot thus be disposed of by mere legislative fiat.

In *Commercial Electric Light & Power Co. v. Tacoma*, 17 Wash. 661-670, the Court says:

"But even if it could be said that plaintiff's franchise was subject to forfeiture under the letter of the ordinance, still it appears that the city waived its right to forfeit by recognizing the ordinance as being in force long after the time it now claims the forfeiture occurred. It maintained its own wires upon the respondent's poles; it assessed and collected taxes on the franchise granted by the ordinance; it failed and neglected to set up the claim of forfeiture in suits which were brought against the city to enforce the same rights now claimed by the respondent, and it is too late now to assert its right and thereby destroy plaintiff's property and business. *Ludlow v. New York, etc., R. R. Co.*, 12 Barb. 440; *Santa Rosa City R. R. Co. v. Central St. Ry. Co.*, (Cal.) 38 Pac. 986; *Spokane St. Ry. Co. v. Spokane Falls*, 6 Wash. 521 (33 Pac. 1072). . . .

"The next contention of appellants is that, regardless of ordinance 318, the Tacoma Electric Company had no authority and, consequently, no power, to assign its corporate privileges and franchises to the respondent, for the reason that, without legislative authority, the grantee of a public or quasi-public franchise cannot assign or sell the same, or in other words, that a public or quasi-public corporation cannot disable itself by contract from the performance of public duties which it has undertaken, without legislative consent. This principle has been frequently declared by the courts and it was especially announced in the following cases cited by the appellants: *Oregon Ry. & Nav. Co. v. Oregonian Ry. Co.*, 130 U. S. 1 (9 Sup. Ct. 409); *Briscoe v. Southern Kan. Ry. Co.*, 40 Fed. 273; *Gibbs*



v. Consolidated Gas. Co., 130 U. S. 396 (9 Sup. Ct. 553). . . .

"The question therefore is, Does the principle announced by the above cases apply to the case at bar? In the first case above cited, a railway company, organized under the laws of Oregon, leased a railroad, its appurtenances and franchises, from a railroad corporation organized under the laws of Scotland, for the period of ninety-six years. The Oregon company took possession of the road leased by it, and for three years operated the same and paid the rent reserved in the lease. It then offered to return the property to its lessor and refused to pay after-accruing rent. The plaintiff brought its action to collect the rent due and payable under the lease, and the court held that the Oregon company was not authorized to lease the railroad, nor the foreign company to make the lease, and that the contract, being contrary to law and public policy, could not be enforced.

"In the *Gibbs case* above cited, the plaintiff sued the defendant corporation for compensation for obtaining a certain contract between it and other gas companies, to regulate the price of gas, etc., and it appeared that such a contract on the part of defendant was absolutely prohibited by law, and the court there held, as in the other case, that the plaintiff was not entitled to recover in the action.

"And in *Briscoe v. Southern Kan. Ry. Co.*, *supra*, the court held that the lease of the railroad which was not authorized by law, was not sufficient to relieve the lessor from liability for damages caused by the negligence of the servants of the lessee who was operating the road.

"But we think there is a plain distinction between these cases and the one at bar. The Tacoma Electric Company did not assign or

transfer any franchise or privilege granted to it by the state. It simply assigned to respondent a privilege which the city in plain terms had granted to it and its assigns, and that right in our judgment was included in that class of property which the statute provides may be bought, held, mortgaged, sold and conveyed by a corporation organized in accordance with the laws of this state. . . .

"It is further urged on behalf of the appellants that the contract to maintain wires upon the poles of the Tacoma Light and Water Company amounted to a mere license revocable at will, and that such license was revoked *ipso facto* by the selling of the light plant to the city. But conceding that to be true, it nevertheless plainly appears that the city continued to enjoy the benefits accruing from that contract up to the very time this action was instituted, for, until that time, it left its own wires upon the poles of the respondent just as they were when the sale was accomplished, and on June 30, 1895, it demanded and received from respondent 'rental' for the use of its poles at the contract price. It cannot be permitted to accept and enjoy the fruits of the contract and at the same time deny its existence or claim that it was revoked."

In *Carter v. Meuli*, 122 Cal. 367-369, the court says:

"It is contended that the franchise could not be assigned without the consent of the granting power, as it is a personal trust. (*Wood v. Truckee*, 24 Cal. 474; *People v. Duncan*, 41 Cal. 511; *Visalia v. Sims*, 104 Cal. 328.)

"We find, however, that after the assignment the board of supervisors recognized assignment and required Mrs. Carter to give

a bond as owner of the franchise. The board also approved and filed the bond.

"This was a ratification and approval of the transfer."

In *The State v. Water Co.*, 61 Kan 547-558, the court says:

"It is earnestly claimed by counsel for plaintiff that The Topeka Water Company had no power to mortgage or convey its franchises granted by the state or the city of Topeka. As to the franchises received from the state we agree, but as to those privileges and rights conferred by the city, the law is well settled against the contention of counsel for plaintiff. There is a marked distinction between a franchise which is essential to the creation and continued existence of a corporation—a right to exist as an artificial being—a right conferred by the sovereignty of the state—and those rights subsidiary in their nature by which the corporation obtains privileges of more or less value, to the enjoyment of which corporate existence is not a prerequisite. A corporation exists by the will of a sovereign power. To this superior authority it owes an allegiance which it cannot abjure. It cannot, by a bargain, sale, or mortgage, alienate or encumber its birthright, nor in any manner part with those accompanying powers granted by its creator which are essential to its existence and vitality. A corporation may exist without property. Therefore, when it sells or mortgages property owned by it, it does not impair its right to live—a privilege conferred by the state and called a franchise. The statutes above quoted expressly authorize a corporation to mortgage its property.

"Counsel for the city treat *the franchise to be a corporation* and the franchise granted to

the water company by the city, giving it a right to occupy the streets, erect hydrants, supply water, etc., as the same. The rights granted to the corporation by the municipality above mentioned have been defined by law-writers as secondary franchises, and the question involved here is treated by Thompson in his Commentaries on the Law of Corporations, section 6140, as follows:

'The courts are united upon the proposition that a corporation has no power, independently of the express grant of the legislature, to mortgage or otherwise alien its franchise of being a corporation. It follows that those who purchase, at a judicial or other sale, the property and franchises of a corporation, do not thereby become a corporation. The purchase may vest in them all that is bought, as property, but they cannot prosecute the enterprise, as being a corporation, until they have been duly incorporated. Nor are they entitled to the restriction upon individual liability of members or stockholders accorded to the stockholders of the old corporation. If they issue bonds before becoming incorporated, they are liable thereon as ordinary obligors are; and the fact that they use the name of the old corporation in issuing such bonds makes no difference. But, as already seen, the secondary franchises of a corporation are assignable, except such franchises as are necessary to the performance of public obligations, and those are assignable only with the express consent of the legislature. The franchise of receiving tolls is a secondary franchise, which is in its nature assignable, at least with the consent of the legislature; and it has been held that authority in the governing statute of a plank-road company 'to mortgage the road or other property,' carries with it the

right to mortgage the franchise of receiving tolls, though not to mortgage any franchise essentially corporate in its nature, and such as cannot be enjoyed by a natural person.'

"Again, in section 6747, the author says:

"The secondary franchises of a corporation—that is to say, the peculiar privileges or rights which it may have received from the legislature under its charter or incorporating act, or from a municipal corporation under an ordinance by way of a license—are in the nature of property, and do not revert to the state upon the death of the corporation, but, being vendible, pass to a receiver or other representative of the corporation, among its other assets, to be administered for the benefit of its creditors; and the corporation may make a valid sale thereof, in like manner with its other property, before it is dissolved.'

"The rule is that the primary franchise of being a corporation vests in the individuals who compose it and not in the corporation itself, while the secondary franchises, such as the right of a railway to construct and operate its road, or the right to operate a water plant and collect water-rents, are vested in the corporation. The principle stated has been generally approved by the courts in this country. (*Union Pacific R. R. Co. v. Lincoln County*, 1 Dill. 325, Fed. Cas. No. 14,378; *Memphis R. R. Co. v. Commissioners*, 112 U. S. 619, 5 Sup. Ct. 299. 28 L. Ed. 837; *Morgan vs. Louisiana*, 93 U. S. 217, 23 L. Ed. 860; *The State, ex rel., v. Irrigating Co.*, 40 Kan. 96, 19 Pac. 349; *Joy v. The Jackson and Michigan Plank Road Co.*, 11 Mich. 164; *Detroit v. Mutual Gas Light Co.*, 43 Mich. 594, 5 N. W. 1039; *Fietsam v. Hay et al.*, 122 Ill. 293, 13 N. E. 501).

"The mortgage to the Atlantic Trust Com-



pany pledged all the property of the water company, including all rights, franchises, tolls, income, right-of-way grants, etc., then owned or to be thereafter acquired by the corporation. No express reference was made in the mortgage to the contract between the city and the water company, but we think the rights obtained under the city ordinances passed to the mortgagee. The ordinances accepted by the water company were in the nature of contracts and were property within the meaning of the law. (*Railway Co. v. Campbell*, ante, p. 439, 59 Pac. 1051; *The West River Bridge Company v. Dix et al.*, 6 How. 534, 12 L. Ed. 535; *Long Island Water Supply Co. v. Brooklyn*, 166 U. S. 685, 7 Sup. Ct. 718, 41 L. Ed. 1165; *New Orleans Gas Co. v. Louisiana Light Co.*, 115 U. S. 650, 6 Sup. Ct. 252, 29 L. Ed. 516; *Thomp. Corp. Sec. 6747*.) Under our statute, the words 'personal property' include money, goods, chattels, evidences of debt, and things in action; and the word 'property' includes both personal and real property. (*Gen. Stat. 1897*, ch. 1, Sec. 8; *Gen. Stat. 1899*, Sec. 7009.)

See also *Vicksburg v. Vicksburg Water Works Company*, 202 U. S. 453-464.

The case of *Louisville v. Cumberland Telephone Company*, 224 U. S. 649, is directly in point that the franchise evidenced by Ordinance 599 is assignable, as any other property rights.

The city of Portland has continuously since January 6, 1869, when Ordinance 599 was adopted, and up to October 6, 1880, when the Oregon Central Railroad Company disposed of its rights to the Oregon and California Railroad Company,



required the Oregon Central Railroad Company to comply with the terms and provisions of this ordinance. Since October 6, 1880 and since the ownership of the Oregon and California Railroad Company and the operation of the railroad by that Company, up to July 1, 1887, the city has recognized the right of the Oregon and California Railroad Company to operate its railroad on Fourth Street, and has required that company to repave the street as required by the ordinance, and otherwise to comply with its terms, and since July 1, 1887, continuously to date; and in Ordinance 16491, attempting to amend Ordinance 599 as stated, the city of Portland has recognized the assignability of this franchise and the right of the Oregon and California Railroad Company and Southern Pacific Company to maintain and operate its railroad thereunder, and both companies have continuously complied with the terms and provisions of Ordinance No. 599.

In addition to this and to the provisions of Section 106 of the act of January 23, 1903, now in effect, *supra*, the city of Portland has by the passage of Ordinance No. 3656, (pages 426-427 and 428 of transcript) recognized the right of the Oregon and California Railroad Company to the operation of its railroad on Fourth street, and in like manner has recognized the right of the Oregon and California Railroad Company by the passage of Ordinance No. 8099 (pages 428 and 429 of tran-

script). Like recognition is shown by the passage of Ordinance No. 13183, granting to the Oregon and California Railroad Company a sidetrack on Fourth street, to be used in connection with its railroad on Fourth street operated and maintained under Ordinance 599 (page 429 of transcript).

The proof shows payment of a large sum in renewals of track, construction of street and maintenance of same as required by Ordinance 599 and as directed from time to time by the city of Portland according to the terms and provisions of that ordinance, both before and after the transfer of the same to the Oregon and California Railroad Company on October 6, 1880, and before and since the transfer of the same by lease by the Oregon and California Railroad Company to Southern Pacific Company.

Under these circumstances it is clear that the city is estopped to claim that the franchise is not assignable or that the complainant is not entitled to assert the rights granted by Ordinance 599. Furthermore, the language of Section 106 of the charter of January 23, 1903, now in effect, *supra*, is a legislative ratification and recognition of Ordinance 599 as assigned to and owned by the Oregon and California Railroad Company and leased to the Southern Pacific Company.

## V.

Under the Articles of Incorporation of the Oregon Central Railroad Company the duration of the corporation was perpetual, and in some jurisdictions it is held that where the duration of the franchise is not stated in the law or ordinance creating the same, the franchise continues during the corporate life of the grantee, and if that corporate life is in perpetuity, the franchise is perpetual. If, however, the duration of the corporation is limited, the franchise does not extend, under that rule, beyond the term of years for which the corporation was created.

St. Clair Co. Turnpike Co. v. Illinois, 96  
U. S. 63, affirming 82 Ill. 174  
Snell v. Chicago, 133 Ill. 413, 432

It has likewise been held by the Supreme Court of Illinois that where on the face of the ordinance granting the franchise, no time is stated, the right exists during the life of the municipality, and that where the municipality granting the right has been annexed to, merged in, or consolidated with a city or other municipality, the right is thereby terminated.

People v. Chicago Tel. Co., 220 Ill. 238

This rule, however, could not apply as to the life of the franchise evidenced by Ordinance No. 599, for two reasons,

*First:* Because the right was not granted by the municipality under the charter of the City of

Portland in effect October 14, 1864, (Pages 64-88 Transcript), but was granted directly by the state under the provisions of Sections 6841 and 6842 Lord's Oregon Laws, being Sections 24 and 25 of the Act of October 14, 1862.

*Second:* Because under Section 106 of the Act of January 23, 1903, being the present charter of the City of Portland, all franchises or privileges heretofore granted by the city, or by any former or the present City of Portland, or by the City of East Portland, or by the City of Albina, were continued in force and effect, "as given or granted by said cities, or either of them."

The Legislative Assembly of the State of Oregon, under the Act of February 19th, 1891, consolidated the then City of East Portland and the City of Albina, and incorporated the three municipalities under the name of the City of Portland. This Act took effect the first Monday in July, 1891, but by Section 213 thereof, all existing city ordinances of the City of Portland, the City of East Portland and the City of Albina as then incorporated and in force at that time, were continued in force and effect, and it was expressly provided that no right vested, nor liability incurred at that time, should be lost, discharged, or impaired. (Session Laws of Oregon, 1891, pages 796, 853)

Under Sections 6679, 6680, and 6683 of Lord's Oregon Laws, in effect under the Corporation Act of 1862, and in effect when the Oregon Central

Railroad Company was incorporated, and when Ordinance No. 599 was passed, authority was given for the formation of a private corporation in perpetuity, and providing that Articles of Incorporation of corporations formed for the purpose of constructing any railroad, should designate the termini of such road. Under Section 6686, such corporation had power to purchase, possess, and dispose of such real and personal property as might be necessary and convenient to carry into effect the objects of the incorporation, etc., and such corporation had power to dispose of its property by way of mortgage, to secure its bonds or other indebtedness.

There is no statute of the state, nor provision of the constitution, which forbids the granting of a franchise in perpetuity, and no such statute or constitutional provision has ever existed in the State of Oregon. Under such circumstances, therefore, the franchise evidenced by Ordinance No. 599, and granted under Sections 6841 and 6842 Lord's Oregon Laws, was one in perpetuity.

The policy of the state statute granting to a corporation a right to occupy any portion of a street within the corporate limits of a municipality, was in harmony with the necessity of the corporation, authorized by its Articles of Incorporation, to construct, operate and maintain a railroad in perpetuity. There is no reason why such railroad company should be given incorporation in per-

petuity, with the right of eminent domain to enable it to acquire rights of way, in perpetuity, and so long as used for railroad purposes; to acquire station grounds, terminals, and other rights needed for the operation of the road, in perpetuity, and at the same time derive from a state statute a right to operate that railroad in the street of a municipality, and assume that such right when so granted without words of limitation, and where no time is fixed, is at the pleasure of the state or municipality, and is a revocable license or permit which can be terminated whenever the state or municipality may elect so to do.

The statement of the contention of the city thus made in the case at bar carries with it its own refutation.

*Ir Des Moines City Ry. Co. v. City of Des Moines*, 151 Fed. 854, 861, the court says:

"For years the city of Des Moines, as well as the street car company, has construed the Turner ordinance as one granting a perpetual franchise, unless forfeited for just cause. Resolution after resolution has been passed by the Council, expressly or impliedly recognizing the Turner ordinance. The Council has compelled the company to pave on account of tracks built since 1898, the date the city now says its franchise expired. It now says that the Turner ordinance expired by limitation in 1898, and that since that time the ordinance has been obsolete. And yet in 1900 in codifying the ordinances in force, and omitting obsolete ones, the Turner ordinance was placed in such Code as a live ordinance, and one of



present binding force. The city council has directed new lines to be built since 1898, and since that date 30 miles have been built at great cost, and by so doing not only construed the ordinance as the company now contends, but the city ought to be and is estopped from denying the contract, tearing up the tracks, or declaring the company a trespasser. The complainant owns the tracks built by the Turner Company and its successors, and by conveyances of record owns the franchises as well, which were assignable. *Railroad v. Delamore*, 114 U. S. 501, 5 Sup. Ct. 1009, 29 L. Ed. 244; *Detroit v. Street Railway*, 184 U. S. 368, 395, 22 Sup. Ct. 410, 46 L. Ed. 592; *People v. O'Brien*, 111 N. Y. 1, 18 N. E. 692, 2 L. R. A. 255, 7 Am. St. Rep. 684.

"It is not to be overlooked that section 1064 of the Revision of 1860 under which the Turner ordinance was enacted, was much enlarged by section 464 of the Code of 1873. What was very doubtful under the Revision was made clear under the Code of 1873, because the city council was then given express authority to authorize both street and steam railways to occupy the streets; the latter, however, to pay damages to abutting property. But the authority of the city as to both was the same; and no one will claim that a steam road after paying damages is limited as to time in its occupancy. The duration as to time as to both is the same, unless limited by the terms of the ordinance. This is important in connection with the words, 'for the time,' in section 1, of the Turner ordinance.

"The fact that the life of complainant as a corporation is limited to a term of years is not decisive, because it has the right under our general corporation laws to renewal. And, if it had not, its assets, including the franchise asset, belong to the stockholders subject

to the rights of its mortgage and general creditors. In 1866 there was no specific statutory authority for granting permission to occupy the streets with street car lines. Des Moines then had but about 6,000 people, and it was about as large as any other city of the state; but Dr. Turner and others had confidence in its growth, and the then city council desired to aid in building up the city by enabling people to reside beyond the business district, so that the ordinance was enacted under a statute giving general control only over the streets. The system was thus inaugurated, and carried on for 14 years, with an expenditure of \$200,000, and no profits. Then when profits were in sight the council granted rights to other companies, and the litigation commenced. But the Iowa legislature by the Code of 1873, gave specific authority to the city councils over the streets as to street railways then and ever so necessary to the people. And since the adoption of the Code of 1873 there have been many recognitions by the city council of what was done in 1866."

In the case of *People v. O'Brien*, 111 N. Y. 1, 38, the court says:

"It will be convenient in the first instance to consider the nature of the right acquired by the corporation under the grant of the common council, with respect to its terms or duration. This is to be determined by a consideration of the language of the grant and the extent of the interest which the grantor had authority to convey. We think this question has been decided by cases in this court, which are binding upon us as authority in favor of the perpetuity of such estates. That a corporation, although created for a limited period, may acquire title in fee to lands or property necessary for its use was decided in *Nicoll v.*

N. Y. & Erie R. R. Co., 12 N. Y. 121, where it was held that a railroad corporation, although created for a limited period only, might acquire such title, and that where no limitation or restriction upon the right conveyed was contained in the grant, the grantee took all of the estate possessed by the grantor.

"The title to streets in New York is vested in the city in trust for the people of the state, but under the constitution and statutes, it had authority to convey such title as was necessary for the purpose, to corporations desiring to acquire the same for use as a street railroad. The city had authority to limit the estate granted either as to the extent of its use or the time of its enjoyment, and also had power to grant an interest in its streets for a public use in perpetuity, which should be irrevocable. (*Yates v. Van DeBogart*, 56 N. Y. 526; in re *Cable Co.*, supra)

"Grants similar in all material respects to the one in question have heretofore been before the courts of this state for construction, and it has been quite uniformly held that they vest the grantee with an interest in the street in perpetuity for the purposes of a street railroad. (*People v. Sturtevant*, 9 N. Y. 263; *Davis v. Mayor etc.*, 14 id. 506; *Milhau v. Sharp*, 27 id. 611; *Mayor etc. v. Second Ave. R. Co.*, 32 id. 261; *Sixth Ave. R. C. v. Kerr*, 72 id. 330.)"

And as applied to the particular franchise, the court, says:

"We are therefore of the opinion that the Broadway Surface R. Co. took an estate in perpetuity in Broadway through its grant from the city under the authority of the constitution and the act of the legislature. It is also well settled by authority in this state that such a right constitutes property within the

usual and common signification of that word. *Sixth Ave. R. Co. v. Kerr*, 72 N. Y. 330; *People v. Sturtevant*, 9 id. 263) When we consider the generality with which investments have been made in securities based upon corporate franchises throughout the whole country; the numerous laws adopted in the several states providing for their security and enjoyment, and the extent of litigation conducted in the various courts, state and federal; in which they have been upheld and enforced, there is no question but that in the view of legislatures, courts and the public at large certain corporate franchises have been uniformly regarded as indestructible by legislative authority and as constituting property in the highest sense of the term.

"It is, however, earnestly contended for the state that such a franchise is a mere license or privilege enjoyable during the life of the grantee only, and revocable at the will of the state. We believe this proposition to be not only repugnant to justice and reason, but contrary to the uniform course of authority in this country."

This case is cited with approval in *Detroit v. Detroit Citizens' St. Ry. Co.*, 184 U. S. 368, 395

In *S. R. T. Co. v. Mayor etc.*, 128 N. Y., 510, 520, the court says:

"A striking feature of this public law, which authorizes the appropriation of the streets and lands within a county for railroad uses, when the necessity for such has been determined by public commissioners, is the imperative nature of the direction to construct, under the penalty of forfeiture, within the time fixed and upon the conditions set forth in its articles. How can a franchise so conferred by the legislature be deemed inchoate and defeasible? Is

not its possession an element of the security upon which capital has been subscribed and loans have been made to the company? The construction of this railroad has been proceeded with upon the plans of the commissioners and with reference to the projection of the route upon the line designated and consented to. The company's funds have been expended with reference to its road, being constructed upon the plans and routes designated by the public agents. In the case of the Broadway Surface R. R. (*People v. O'Brien*, 111 N. Y. 1) the corporate franchise, acquired under the authority of the legislature and the consent of the municipal authorities, to lay tracks and to run cars upon Broadway, was held by us to be a right indestructible by the legislature, and to constitute property in the highest sense of that term."

In *Govin v. City of Chicago*, 132 Fed. 848, 855, the court says:

"The language used in the section under consideration, must be read in view of this, the then prevailing idea respecting railway grants. Thus viewed, it constituted a clear and definite grant of authority to the companies to occupy the streets, a grant direct, and not by circumlocution; a grant by the legislature to the companies, not the grant of power to the city to grant in turn to the companies.

"True, the streets to be used are not set out by name; but they are set out by description, a description that fixes with certainty their identity as to the then past, and with equal certainty the means of identity as to the then future; and it is a universal maxim in law, that that is certain that can be made certain. True, also, that the grant is in the nature of a float, not attaching to any specific street until such street has been designated; but when the

street has been designated, the grant attaches as of the date of the act. In that sense, the grant is in praesenti. *U. S. v. Southern Pac. R. Co.*, 146 U. S. 593, 13 Sup. Ct. 152, 36 L. Ed. 1091; *St. Paul & N. P. R. Co. v. Northern Pac. R. Co.*, 139 U. S. 5, 11 Sup. Ct. 389, 35 L. Ed. 77. We cannot escape the judgment that the legislature intended, in this section, to grant to the companies named, directly out of its own plenary power over the subject matter, the streets designated, or to be designated, to the extent that the franchise granted was essential to the promotion of street railway facilities."

In *Louisville Trust Co. v. City of Cincinnati*, 76 Fed. 296, 315, the Circuit Court of Appeals for the Sixth Circuit, speaking by Circuit Judge Lurton, says:

"The grant under the ordinance of December, 1871, was unlimited as to time. There was at that time no statutory restriction upon the power of a city to grant an unlimited street easement to either a railroad or street car company, having the requisite franchises from the state. The act limiting the power of a city to a term not exceeding 25 years was not passed until May 14, 1878. Neither do we think there was any implied restriction upon the power of the city, springing from reasons of public policy. The corporation to which this grant was made was perpetual, and we see no sufficient reason which would justify the court in holding that it was not within the discretion of the municipal government to grant to such a company an unlimited easement upon the streets."

This case is also a controlling authority upon the point that the rights evidenced by Ordinance No.



599 can be mortgaged, transferred or sold, as an easement or property right. The court, speaking upon that subject, says:

"That these street easements originate in certain statutes of the state of Ohio and certain ordinances of the city of Cincinnati does not affect their character as contracts entitled to the protection afforded by the constitution of the United States. The grant of a right to enter upon and occupy a public street with the necessary tracks, poles, wires, and equipment of an electric street railway is a grant of a typical easement in property, and as such is a contract right capable, in the absence of express restrictions, of being sold, conveyed, assigned, or mortgaged, and is, therefore, a right entitled to all the protection afforded other property or contract rights. Such a grant, as we had occasion to decide in *Detroit Citizens' St. Ry. Co. v. City of Detroit*, 22 U. S. App. 570, 580, 12 C. C. A. 365, 372, and 64 Fed. 628, 635, may be for a term longer or shorter than the corporate life of the company receiving it, the duration of the estate being dependent upon the terms of the grant and the power of the grantor to make it. We then said that there was 'nothing in the nature of the property rights involved in a grant of an easement in the streets for street railway uses which distinguishes it from other property acquired by a corporation in the exercise of its franchises.' "

To the same effect is *Railroad Co. v. Delamore*, 114 U. S. 501. The court in *City Railroad Co. v. Citizens' R. Co.*, 166 U. S. 557, expressed no opinion whether the complainant was entitled to a perpetual franchise from the city.

In *Citizens' St. R. Co. v. City of Detroit*, 64 Fed. 628, 646, the court construed a provision of the state constitution of Michigan which provided that no corporation, except for municipal purposes, or for the construction of railroads, plank roads and canals, should be created for a longer period than thirty years, and speaking of that proviso, the court says:

"It has been much debated as to whether street railways come within this prohibition. Street railways were practically unknown when the constitution was adopted. The provision referred to seems to except out of the limitation all that class of quasi public corporations to which a street railway belongs. The same reasons which would demand a long continuance of the powers of a commercial road, a canal, or a plank road, apply to a street railway. These considerations seem to indicate that a railway is not within the class of corporations to which the constitutional inhibition is applicable, and, if applicable at all, it is only so because the excepted corporations are specifically named. The spirit of the provision would include such companies within the exceptions. The legislature, by the limitation imposed upon the life of street railway corporations, was probably of opinion that the letter of the constitution operated to require them to apply the limitation, inasmuch as a street railway is not a commercial railway. In any view of the question, that constitutional provision does not afford evidence of any such strong public policy as should operate to impose a limitation upon the power of the city to make a grant of a right of way extending for 16 years beyond the corporate life of the grantee.

"The evils to be apprehended from long grants of easements to such companies seem to us not to be such as to justify a constructive limitation on that account. The power to make an irrevocable contract giving an easement of some considerable duration is an inseparable incident in any scheme for furnishing such public facilities as a street railroad. The duration of such grants must be a question of discretion to be exercised by some public authority. That the exercise of that discretion should be left to the local government as a question of purely local interest seems most consistent with the proprieties of the case, and most in accord with the decentralizing policy so peculiar to the state of Michigan."

If we apply this cogent reasoning to the case of a commercial railroad constructed and to be operated by a corporation created with perpetual duration, where, under a state statute, such railroad company is granted the right to use the streets of a municipality for the location and operation of such railroad, it is clearly seen that although the grant when given contains no limitation as to time on its face, such grant is of necessity perpetual.

It may be observed that Section 6841 and 6842 Lord's Oregon Laws, have never been repealed or modified, unless repealed by implication by legislative charters granted to municipalities in the State of Oregon. It is also true that until the adoption of the charter of the City of Portland, now in effect, on January 23, 1903, there was no limitation imposed by any charter as to the extent

or term for which a franchise could be granted to a railroad company, to locate, construct and operate a railroad in the City of Portland. This provision of the charter, (Page 12 Transcript) is clearly intended not to, and must be construed not to be retroactive. From 1862, when these provisions of the statute were adopted, until the present time, there has been no attempt to restrict or limit the duration of franchises to be granted by the state, and it was not until the adoption of the present charter of the City of Portland on January 23, 1903, that such attempt to limit franchises to be granted by the city, was carried into effect. If, therefore, Ordinance No. 16491, *supra*, is a modification or repeal of Ordinance No. 599, or if the rights of the company have been forfeited thereunder, by reason of a violation of any of the terms or provisions of such ordinance, it follows logically that the company would be without any right to maintain or operate its railroad on Fourth Street, and, although no franchise was tendered or offered to the complainant or its lessor, in lieu of the rights evidenced by Ordinance No. 599, any franchise tendered would necessarily be limited, under the terms and provisions of the present charter, and would be limited to a period of twenty-five years, and such grant would necessarily be burdened with the conditions and restrictions under the present charter by which any other railroad company could be granted a common user of the same tracks, under any new franchise that

might be offered. Not only so, but such franchise, under the present charter, would be subject to valuation, and the grantee would be compelled to pay not a license fee regulatory in character, under the police power of the state, but a price or value at which the franchise should be valued by the Executive Board of the city, and this value would be conclusive upon the applicant or grantee, and would become a part of the contract, if accepted by the grantee, and become an annual burden for a period of twenty-five years, and during the life of the franchise.

These circumstances show how important it is to protect and preserve the property rights created under the provisions of the state statute referred to, and evidenced by Ordinance No. 599, and how important it is that the valuable rights should not be taken from the owner by a legislative declaration, without judicial inquiry.

Capdevielle v. New Orleans & S. F. R. Co.,  
110 La. 903

In Blair v. City of Chicago, 201 U. S. 400, the court construed certain ordinances passed by the City of Chicago. The court, speaking by Mr. Justice Day, says:

"The act under consideration nowhere assumes to fix the duration of the grant, nor excludes the conclusion that it is embraced in the terms and conditions which are to be fixed by contract with the city. If the franchise to use the streets, without regard to municipal action, was fully conferred by the

legislative act under consideration, then the company had only to take possession of the streets, subject to regulations as to running of cars, etc., by the city council. On the contrary, under the terms of this act, the city, by withholding its consent, could prevent the use of the streets by the corporations. No way is pointed out by which this consent could be compelled against the will of the council. That body might, for reasons sufficient to itself, under the terms of this act, by withholding assent, determine that it was undesirable to have the corporations in control of the use of the streets."

This recognizes the power granted under statutes similar to Sections 6841 and 6842 Lord's Oregon Laws. It should be noted that under these sections just cited, the railroad company could appropriate such portion of the street as might be necessary for the location, construction and operation of its railroad, *whether the city consented or not*, while under the statute and ordinance construed in the case last cited, in order to make the grant under the state statute effective, it was necessary that the city should give its consent, and in giving its consent, it could impose such terms and restrictions as in its judgment seemed advisable, and it could refuse its consent altogether.

In *City of Seattle v. Columbia & P. S. R. Co.*, 6 Wash. 380, the court says:

"The property of railroad companies is as much within the protection of the law as that of any other company or of any individual. Railroads are recognized as essential to the



welfare and prosperity of the people, and because of their capacity for usefulness to the whole people, railroad companies are invested with large powers of a public nature. The laws of the state also provide for the organization of cities, and large powers are granted to them relating to the control and regulations of matters within the municipal limits; but, when a broad interpretation of such powers clashes with acquired property rights, as in this instance, such reasonable construction should be given them as shall not have the effect of destroying, or even materially injuring, such rights. The city must so use its powers as to enable the respondents to have a reasonable use and enjoyment of theirs, and not so as to render it impossible or even very difficult for the respondents to reconstruct and operate their railroads. - 1 Rorer, Railroads, p. 553, par. 13. Property rights acquired under and by virtue of franchises thus granted are perpetual, unless otherwise limited in the grant; and there was no limit in this instance, and such franchises are not void in consequence thereof. There is no sound reason why a municipal corporation may not bind itself in this particular, as well as an individual may. On the contrary, well recognized principles of justice require that it should be so bound, to the end that property rights may be made stable and certain; and the municipality is sufficiently protected under such circumstances; for, should it become necessary to thereafter undo the work, and terminate the rights granted, and to take the property of the corporation acquired in pursuance and by virtue thereof, it may do so under the exercise of the power of eminent domain upon making compensation; and this is a sufficient protection for the rights of the city, and one which, at the same time, affords protection to

the rights of the respondents. *State v. Noyes*, 47 Me. 189; *Port of Mobile v. Louisville, etc. R. R. Co.*, 84 Ala. 115 (4 South Rep. 106)."

In *Louisville v. Cumberland Telephone Co.*, 224 U. S. 649, 662, Mr. Justice Lamar, speaking for the court, says:

"The plaintiff in error makes the further contention that its general demurrer should have been sustained and the bill dismissed because the original grant of street rights, having been indefinite as to time, was either void ab initio, or revocable at the will of the General Council, or that it expired in 1893 when (Ky. Stat. 1909, Sec. 2742) Louisville was made a city of the first class with new and enlarged power. In support of this proposition numerous decisions are cited, in some of which it appeared that a state had chartered a public utility corporation, but the city by ordinance had given an exclusive or perpetual grant of a street franchise which was held to be void because made in excess of the statutory power possessed by the municipality. In others the company had been incorporated for thirty years, and the street right was held to have been granted only for that limited period. In others it was decided that such privileges terminated with the corporate existence of the municipality through whose streets the rails and tracks were to be laid. *Detroit Citizens' St. Ry. v. Detroit Railway*, 171 U. S. 48, 54; *St. Clair County Turnpike Co. v. Illinois*, 96 U. S. 63; *Blair v. Chicago*, 201 U. S. 400; 3 Dill. Mun. Corp., Secs. 1265-1269.

"None of these decisions are applicable to a case like the present, where the Ohio Valley Telephone Company, with a perpetual charter, has received, not from the municipality, but from the State of Kentucky, the grant of

an assignable right to use the streets of a city which remains the same legal entity, although by a later statute it has been put in the first class and given greater municipal powers. *Vilas v. Manila*, 220 U. S. 345, 361.

"In considering the duration of such a franchise it is necessary to consider that a telephone system cannot be operated without the use of poles, conduits, wires and fixtures. These structures are permanent in their nature and require a large investment for their erection and construction. To say that the right to maintain these appliances was only a license, which could be revoked at will, would operate to nullify the charter itself, and thus defeat the State's purpose to secure a telephone system for public use. For, manifestly, no one would have been willing to incur the heavy expense of installing these necessary and costly fixtures if they were removable at the will of the city and the utility and value of the entire plant be thereby destroyed. Such a construction of the charter cannot be supported, either from a practical or technical standpoint.

"This grant was not at will, nor for years, nor for the life of the city. Neither was it made terminable upon the happening of a future event, but it was a necessary and integral part of the other franchises conferred upon the company, all of which were perpetual and none of which could be exercised without this essential right to use the streets. The duration of the public business in which these permanent structures were to be used, the express provision that franchises could be mortgaged and sold, the nature of the grant, and the terms of the charter as a whole, compel a holding that the State of Kentucky conferred upon the Ohio Valley Telephone Company the right to use the streets to the extent and for

the period necessary to enable the company to perform the perpetual obligation to maintain and conduct a telephone system in the city of Louisville. Such has been the uniform holding of the courts construing similar grants to like corporations. *Milhau v. Sharp*, 27 N. Y. 611 (1863); *Hudson Telephone Co. v. Jersey City*, 49 N. J. L. 303; *Mobile v. L. & N. R. R. Co.*, 84 Ala. 122; *Seattle v. Columbia & P. S. R. R.*, 6 Wash. 379, 392; *People v. Deehan*, 153 N. Y. 528. The earlier cases are reviewed in *Detroit St. R. R. v. Detroit*, 64 Fed. Rep. 628, 634, which was cited with approval in *Detroit v. Detroit St. R. R.*, 184 U. S. 368, 395, this court there saying that 'Where the grant to a corporation of a franchise to construct and operate its road is not, by its terms, limited and revocable, the grant is in fee.'

"The right to conduct a telephone exchange and to use the streets of the city of Louisville, which had been vested by law in the Cumberland Telephone & Telegraph Company, could not be impaired or forfeited by an ordinance of the General Council."

## VI.

This railroad line on Fourth Street is a part of the road designated and required to be built under the Act of Congress of May 4, 1870, (16 Stat. at Large, 94) and is there pursuant to this Act and the laws of the state, and cannot be abandoned by the company or its successors, even if they desired so to do. The City of Portland cannot deprive the company or its successors of the use of this portion of its rights under the Act of May 4, 1870, and the laws of the state under which the Oregon Central Railroad Company was incorporated. The

operation of this road as a commercial road necessarily includes the use of steam locomotives and freight trains. Such use and operation, pursuant to this Act of Congress and the laws of the state, is subject only to reasonable regulation under the police power of the state or city, which does not amount to prohibition of the substantial use of such instrumentalities.

3 Dillon on Municipal Corp. Secs. 1269, 1270.

Destruction of the right to operate this railroad between its termini would deprive the company of its right, not only to operate its railroad as a commercial road leading from Corvallis, in Benton County, nearly one hundred miles distant, but would burden and restrict to that extent any interstate business moving over that line. It is freely conceded that under the police power the state or city, as the case may be, may reasonably regulate the use of the right and may, in that behalf, reasonably limit the time when steam locomotives may be used upon this street, and may reasonably limit the time when freight trains may be operated thereon, but such regulations must be consistent with the substantial use and enjoyment of the rights granted.

In *Wisconsin Telephone Co. v. City of Oshkosh*, 62 Wis. 32, 40, the court aptly says:

"But we do not think this was designed as giving to the municipality absolute authority to remove such poles and wires entirely from the city, nor to exclude such companies alto-

gether from carrying on or operating their business within the corporate limits of the city, but simply to regulate the same, and to prohibit such location in improper places. Otherwise the municipalities of the state would have the power to nullify what the legislature had expressly authorized.

"Undoubtedly the common council, under the charter, had the right to regulate, in order to guard and secure the public safety and convenience, but their regulations, to be valid, should have been reasonable and fair, and not have gone to the extent of confiscation, nor of wholly excluding the plaintiff from the city."

This quotation is particularly apt, as it applies to the attempt upon the part of the city by the ordinance complained of, to prohibit the substantial and valuable use of the necessary instrumentalities of the business in which the complainant is engaged, and for which the Oregon Central Railroad Company and its successors were incorporated.

## VII.

Even if it be conceded that the city could, under the police power, prohibit the use of steam locomotives on Fourth Street, it could not, as it attempted to do under Ordinance No. 16491, deprive the company of its right, under reasonable regulations, to move its freight trains at some time during the twenty-four hours. Such a prohibition is a taking of the property of complainant, under the guise of the exercise of the police power; it is not regulations, it is confiscation.



This principle is well illustrated in *State ex rel Wisconsin Tel. Co. v. City of Sheboygan*, 111 Wis. 23, 36; also in *Wisconsin Telephone Co. v. City of Oshkosh*, 62 Wis. 32, 40, and other cases cited under Point VII.

In *American Union Tel. Co. v. Harrison*, 31 N. J. Eq. 627, the court says:

"The design is to invest telegraph companies with the right to use the streets of an incorporated town for the purpose of erecting their poles therein, subject, nevertheless, to such municipal control as shall be necessary to secure to the public, safety, convenience and freedom in the use of the streets. The municipal authorities may say what streets shall be used, at what points in the streets the poles shall be erected, and how they shall be planted and secured, but they have no power to lay an embargo. They have a right to regulate, but not to interdict. And their regulations, to be valid, must be reasonable and fair."

See also *Township of Summit v. N. Y. & N. J. Tel. Co.*, 57 N. J. Eq. 123

## VIII.

If Ordinance No. 16491 be invalid in respect to the prohibition against the movement of freight traffic, then the entire ordinance is void. It is a fundamental rule that if part of an ordinance is void, another essential and connected part of the same is also void. Where an ordinance or statute is couched in terms so broad as to exceed the limitation of the powers of the Council or legislature to enact the same, the court will not by construction

limit the statute to the scope which might constitutionally be given it by the Council or legislature, but will hold the ordinance or statute unconstitutional and void.

This principle is particularly applicable to a case where, as here, two acts are prohibited by the terms of the same section, and where the punishment or penalty for these two acts, when separately or collectively committed, is defined in another section, and where it is impossible to assume that the Council would have enacted the one without the other, and where it is impossible to separate the legal from the illegal provisions.

In *State v. Mayor of Hoboken*, 38 N. J. L. 111, the court says:

"They fall within the rule that if part of a by-law, ordinance or resolution be void, another essential and connected part of the same by-law, ordinance or resolution is also void. Dillon's Mun. Corp. Section 354."

In *United States v. Ju Toy*, 198 U. S. 253, 262, the court says:

"But the relevant portion being a single section, accomplishing all its results by the same general words, must be valid as to all that it embraces, or altogether void. An exception of a class constitutionally exempted cannot be read into those general words merely for the purpose of saving what remains. That has been decided over and over again."

See also *Illinois Cent. R. R. Co. v. McKendree*, 203 U. S. 514,

The prohibition of the operation of steam loco-

tives or freight cars is contained in a single section, and the penalty for the operation of steam locomotives or freight cars is contained in a separate section. It is impossible to separate the two acts attempted to be prohibited or punished. In such cases if either thing prohibited or punished is not within the legislative power, the statute is void.

### IX.

A court of equity has power to protect private property, and to enjoin a continuing injury to property or business, and where a criminal prosecution is threatened or invoked, to prevent the exercise of civil rights conferred by law, injunction is the proper remedy to prevent injury to the property or business thus menaced.

In *City of Bessemer v. Bessemer Waterworks Co.*, 152 Ala. 391, 402, the court says:

"The jurisdiction of equity to protect a vested franchise from unlawful invasion or disturbance, upon the ground of irreparable injury, or such injury as cannot be adequately estimated in damages at law, seems to be recognized by our decisions," citing many cases.

In *Millville Gas Light Co. v. Vineland Light & Power Co.*, 72 N. J. Eq. 305, 307, the court says:

"Legislative grants of franchises of the nature claimed by complainant, whether granted by special charters or under general laws, confer privileges which are necessarily exclusive in their nature as against all persons upon whom similar rights have not been conferred,

for any attempted exercise of such rights, without legislative sanction, is not only an unwarranted usurpation of power, but operates as a *direct invasion of the private property rights of those upon whom the franchises have been so conferred*," citing many cases.

Also,

"It follows that if complainant is at this time entitled to exercise in the disputed territory the privileges set forth in the legislative act referred to, and defendant, as claimed, enjoys no legislative sanction for the conduct sought to be enjoined, complainant will be entitled to the relief prayed for."

In *Vicksburg Waterworks Co. v. Vicksburg*, 185 U. S. 65, 82, the court says:

"It is further contended that the bill does not disclose any actual proceeding on the part of the city to displace complainant's rights under the contract, that mere apprehension that illegal action may be taken by the city cannot be the basis of enjoining such action, and that therefore the Circuit Court did right in dismissing the bill. We cannot accede to this contention. It is one often made in cases where bills in equity are filed to prevent anticipated and threatened action. But it is one of the most valuable features of equity jurisdiction, to anticipate and prevent a threatened injury, where the damages would be insufficient or irreparable. The exercise of such jurisdiction is for the benefit of both parties; in disclosing to the defendant that he is proceeding without warrant of law, and in protecting the complainant from injuries which, if inflicted, would be wholly destructive of his rights."

In the case at bar the city was actually prosecut-

ing the General Manager of the complainant, under the terms of the ordinance in question. He was subject to arrest while engaged in the operation of this railroad pursuant to law. He was but asserting the rights of the company, and the rights of the public in that behalf. The penalties denounced by the ordinance are extremely severe and cumulative, and repeated prosecutions would not only imprison the officer in charge of the property, and responsible for its operation, but would interrupt and destroy the business of complainant, under the grave penalty of forfeiture of all rights under Ordinance No. 599, and under the laws of the state. Under these circumstances a court of equity has clear and undoubted jurisdiction.

To the same effect is *Railroad Company v. Town of Triadelphia*, 58 W. Va. 487. See also

*Vicksburg v. Vicksburg Waterworks Co.*,  
202 U. S. 453, 460

*Detroit v. Detroit Citizens' St. Ry. Co.*, 184  
U. S. 368, 381

*Southern Bell T. & T. Co. v. City of Mobile*,  
162 Fed. 523, 532

*Des Moines City Ry. Co. v. City of Des  
Moines*, 151 Fed. 854

We need not discuss further the legal questions involved and set out under Points X, XI, XII and XIII.

## CONCLUSION

The trial court in its opinion, (Pages 27, 28, 30 Transcript) erroneously assumed, as it seems to us, that the city was vested with the right and power at the time Ordinance No. 599 was passed, to designate the street upon which the company should locate its road, and this carried with it the power to impose reasonable conditions to such grant or permission, which, when accepted by the grantee, became binding upon it.

An examination of Sections 6841 and 6842 Lord's Oregon Laws, shows that the city did not have any power to designate the street, if the parties were unable to agree. It was only where the parties were able to agree that the city could designate the street or portions thereof which might be appropriated by the railroad company. In other words, the grant by the Legislative Assembly was absolute and unqualified when the parties failed to agree as to the street to be used. If they agreed upon the location, they could perhaps, for the company *and the state* agree upon the terms and conditions of such use, but the right granted was derived from the state, and the only right that could be exercised by the city was that reserved in the grant, and which the state or city could not part with under the police power. It therefore must be assumed, as it seems to us, that the only right that was reserved to the city was that right of police regulation which the parties attempted to define by the



terms and provisions of Ordinance No. 599. If in the exercise of the police power something more could be done by the state or city, it is in the way of regulation, and not in the way of impairment or destruction of the use. The city as such, under Sections 6841 and 6842 Lord's Oregon Laws, *supra*, could make or impose no conditions or terms and could exercise no legislative power, excepting possibly such as may be implied in the exercise of the police power. These terms and conditions arose not upon contract, excepting in so far as the right to contract upon the part of the city may be incident to the designation of the particular road, street, alley or public grounds to be used. The city had no other power under either section than to designate the street or portion thereof, if satisfactory to the railroad company. The city had no such power as is conferred upon the county court under section 6841 with reference to roads, streets, alleys, or public grounds which are not within the corporate limits of a municipal corporation. It is, of course, fundamental that the county court, in respect to this matter, had no legislative power and, we take it, the city under section 6842 had no legislative power as such. There seems to be a distinction between the authority conferred upon the county court as to the highways and public grounds in the county and within the limits of an unincorporated town and such highways and public grounds within the corporate limits of a municipal corporation. The former was under the jurisdic-

tion of the county court without legislative power but with the power to contract upon the extent, terms and conditions upon which railway company might use the street, road, alley or public grounds. The local authorities, however, of a municipal corporation could only designate the particular road, street, alley or public grounds or a portion thereof to be used, and if they failed or refused to make such designation, when requested, the railway company could make such appropriation notwithstanding. Although this distinction is not very clearly made such would seem to be the true construction of these two sections.

Douglas County Road v. Canyonville & G.  
Co. 8 Or. 102;

Canyonville & G. Road v. Stephensen, 8 Or.  
264;

Douglas County Road v. Abraham, 5 Or.  
319;

Paquet v. Mt. Tabor St. Ry. Co. 18 Or. 233;

McQuaid v. Portland & Vancouver Ry. Co.  
18 Or. 237;

Turney v. Southern Pacific Co., 44 Or. 280;

Willamette Iron Works v. Oregon R. & N.  
Co. 26 Or. 227;

Tillamook County v. Wilson River Road Co.  
49 Or. 309;

State vs. Douglas Co. Road Co. 10 Or. 185;

Oregon Ry Co. vs. City of Portland, 9 Or.  
231.

The case resolves itself primarily into the question of whether or not it was a reasonable regulation under the police power, to prohibit the com-

plainant from the operation of steam locomotives at any time, and the movement of freight traffic at all times, on Fourth Street. We may therefore summarize our conclusions as follows:

*FIRST:* The franchise owned by the Oregon Central Railroad Company was granted by the state, under the provisions of Sections 6841 and 6842 Lord's Oregon Laws.

*SECOND:* The charter of January 23, 1903, under which the City of Portland attempted to pass Ordinance No. 16491, did not amend, modify or repeal Sections 6841 or 6842 Lord's Oregon Laws, or abrogate any of the essential rights evidenced by Ordinance No. 599.

*THIRD:* The rights granted under the state statute, evidenced by Ordinance No. 599, constituted an irrevocable franchise or contract, which could not be altered, impaired or modified, and when accepted by the grantee, became a vested property right, which could be assigned, conveyed, mortgaged, sold, leased, or otherwise disposed of in the same manner and for the same purposes as any other property of this kind.

*FOURTH:* It was not within the reasonable exercise of the police power of the city or state, to prohibit the operation of steam locomotives, or the movement of freight traffic, on this street; such prohibition would not be a reasonable regulation of an existing right.

**FIFTH:** The rights granted by the state statute, and evidenced by Ordinance No. 599, could not be destroyed by an ordinance declaring the use and operation of steam locomotives, or the movement of freight traffic, a nuisance. Nor could the Council, under the police power, attempt to prohibit such use, under penalty of forfeiture.

**SIXTH:** The rights granted by the state statute, and evidenced by Ordinance No. 599, were assignable, and the City of Portland has ratified the assignment, and is estopped to dispute the assignability of this franchise, and that complainant has no rights thereunder.

**SEVENTH:** By Section 106 of the Act of January 23, 1903, now in effect, the City of Portland has ratified and confirmed Ordinance No. 599, and recognized and ratified its continuance in force and effect, as originally granted.

**EIGHTH:** The franchise granted by the state statute, and evidenced by Ordinance No. 599, is one in perpetuity.

**NINTH:** Ordinance No. 16491 infringes upon the right of complainant and its predecessor to operate its railroad on Fourth Street, and is contrary to the obligation imposed upon the railroad company by the Act of Congress of May 4, 1870, and by the laws of the state.

**TENTH:** The prohibition of the right to operate steam locomotives or move freight traffic on this

street, under the guise of the police power, is a taking of the property of complainant; it is not regulation; it is confiscation.

*ELEVENTH*: Ordinance No. 16491 is invalid if either thing prohibited to be done is not within the power of the city. Even though it may be within the police power to prohibit the movement of steam locomotives at all times, it is so connected with the prohibition against the movement of freight traffic, as that the ordinance is void for that reason, if it is not within the power of the Council to prohibit the movement of freight traffic.

*TWELFTH*: A court of equity has jurisdiction to prevent threatened wrong and the invasion of the rights of complainant.

*THIRTEENTH*: Ordinance No. 16491 impairs a vested property right of complainant, deprives the complainant of its property without due process of law, and denies to complainant the equal protection of the law.

*FOURTEENTH*: When the manner of enforcing municipal regulations is prescribed by law, such method is exclusive, and by Section 5, of Ordinance No. 599, the manner of enforcing the same is prescribed, and this manner is exclusive. In case of violation of its terms by the railroad company, such violation can be prohibited, or the terms of the ordinance enforced by a suit or action in the name of the city, or in the name of the state, on the relation of the city, and not otherwise.

**FIFTEENTH:** Ordinance No. 16491 is an ex post facto law, in that it imposes an additional penalty to that prescribed in Ordinance No. 599.

**SIXTEENTH:** Ordinance No. 16491 is void in that it alters the existing remedy under Ordinance No. 599, to such an extent as materially to effect the rights of the railroad company. The remedy prescribed in Ordinance No. 599 for the enforcement of the contract is a part of such contract, and such remedy cannot be so limited or changed so as to impair the contract.

**SEVENTEENTH:** The penalties prescribed by Ordinance No. 16491 are in excess of the power or authority of the Council, under its charter of January 23, 1903, in this, that in addition to fine and imprisonment, it attempts to impose a forfeiture of any and all rights and privileges claimed by the railroad company under Ordinance No. 599.

For these reasons we respectfully submit that the decree of the court below should be reversed.

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## APPENDIX.

## ORDINANCE No. 599.

An ordinance Authorizing the Oregon Central Railroad Company of Portland, to Lay a Railroad Track and Run Cars Over the Same, Within the City of Portland.

The City of Portland does ordain as follows:

## FRANCHISE-ROUTE

Section 1. The Oregon Central Railroad Company, of Portland, Oregon, is hereby authorized and permitted to lay a railway track and run cars over the same along the center of Fourth Street, from the south boundary line of the City of Portland, to the north side of "G" Street, and as much farther north as said Fourth Street may extend or be extended, upon the terms and conditions as hereinafter provided.

## GRADE AND REPAIRS.

Section 2. The said railroad company shall grade to established grades, construct and maintain in good repair said street, at least six feet in width upon each side of the center line of said street, and as much wider as may be affected by said railway or the construction thereof, and shall do and perform said work and the improvement and the repair thereof in such manner and as often as the Common Council of the City of Portland may at any time provide for or require.

Section 3. The Common Council reserve the right to make or to alter regulations at any time as they deem proper for the conduct of said road within the limits of the city, and the speed of railway cars and locomotives within said limits, and may restrict or prohibit the

running of locomotives at such time and in such manner as they may deem necessary.

Section 4. All alteration of grades or streets required for laying said railroad track, and all improvements and repairs of the same for said purpose, shall be made at the expense of the said railroad company, and the same shall be made as may be provided by ordinance.

Section 5. It is hereby expressly provided that any refusal or neglect of the said Oregon Central Railroad Company to comply with the provisions and requirements of this ordinance, or any other ordinance passed in pursuance hereof, shall be deemed a forfeiture of the rights and privileges herein granted; and it shall be lawful for the Common Council to declare by ordinance, the forfeiture of the same, and to cause the said rails to be removed from said street.

Approved Jan. 6th, 1869.

ORDINANCE No. 16491.

An Ordinance prohibiting the operation of steam locomotives and freight cars on Fourth Street between Glisan Street and the southerly limits of the City of Portland after eighteen months from the date of the passage of this ordinance, and providing a penalty for the violation thereof.

The City of Portland does ordain as follows:

Section 1. It shall be unlawful for the Oregon Central Railroad Company of Portland, Oregon, its successors, assigns, or their lessees, or any other person, firm or corporation, to run or operate steam locomotives or freight cars over, upon or along Fourth Street between Glisan Street and the southerly limits of the City of Portland, from and after eighteen months from the final passage and ap-

proval of this ordinance, excepting freight cars for the reconstruction, repair or maintenance of the railway lawfully and rightfully on said street.

Section 2. Any violation of the provisions of this ordinance by the owners, officers, agents or employes of said Oregon Central Railroad Company, or its successors, assigns, or lessees or any other person, firm or corporation, by so running or operating steam locomotives or freight cars (other than those excepted in section 1 hereof), or attempting to run or operate the same on said Fourth Street after the time mentioned in section 1 of this ordinance, shall be punishable by a fine of not less than \$250.00, nor more than \$500.00, or by imprisonment for not more than six months, or by both such fine and imprisonment, and each day's running or operating, or attempting to run or operate such steam locomotives or freight cars, shall constitute a separate offense, and such violation shall be deemed a forfeiture of any and all rights and privileges claimed by said Oregon Central Railroad Company with respect to the operation of any railway on said street.

Section 3. This ordinance shall not be construed so as to recognize, assent to, affirm, confirm, ratify or extend any right, franchise or privilege relative to the maintenance or operation of any railway, or the use, operation, or running of any railway car or cars, motor or motors, locomotive or locomotives, or other railway vehicle or vehicles in, on, over, along or upon said Fourth Street heretofore, now or hereafter claimed, alleged or set up by any person, persons, firm or corporation.

Lord's Oregon Laws, Section 227.

What property liable to execution and what exempt.

All property, including franchises, or rights or interest therein, of the judgment debtor, shall be liable to an execution, except as in this section provided. The following property shall be exempt from execution, if selected and reserved by the judgment debtor or his agent at the time of the levy, or as soon thereafter before sale thereof as the same shall be known to him and not otherwise:— \* \* \* \* \*

Lord's Oregon Laws, Section 6679.

Private corporations authorized.

Whenever three or more persons shall desire to incorporate themselves, for the purpose of engaging in any lawful enterprise, business, pursuit or occupation, they may do so in the manner provided in this act. (L. 1862, D. p. 658, § 1; H. § 3217; B. & C. § 5052.

Lord's Oregon Laws, Section 6680.

Articles of Incorporation, How Made and Filed.

Such persons shall make and subscribe written articles of incorporation in triplicate, and acknowledge the same before any officer authorized to take the acknowledgement of a deed, and shall file one of such articles in the office of the secretary of state, and cause the same to be recorded by him in a book to be kept in his office for that purpose, and shall file another with the clerk of the county where the enterprise, business, pursuit, or occupation is proposed to be carried on, or the principal office or place of business is proposed to be located, and cause the same to be recorded by him in a book to be kept in his office for that purpose, and shall retain the third in the possession of the corporation. (L. 1862; D. p. 658, § 2; L. 1891, p. 110, § 1; H. § 3218; B. & C. § 5053.)

**Lord's Oregon Laws, Section 6683.**  
**Articles of Incorporation, What to Specify.**

The articles of incorporation shall specify,—

1. The name assumed by the corporation and by which it shall be known, and the duration of the corporation, if limited;

2. The enterprise, business, pursuit, or occupation in which the corporation proposes to engage;

3. The place where the corporation proposes to have its principal office or place of business;

4. The amount of the capital stock of the corporation;

5. The amount of each share of such capital stock;

6. If the corporation is formed for the purpose of navigating any stream or other water, or making or constructing any railroad, macadamized road, plank road, clay road, canal, or bridge, the termini of such navigation, road, canal, or the site of such bridge. (L. 1862; D. p. 659, § 4; H. § 3220; B. & C. § 5055.)

**Lord's Oregon Laws, Section 6686.**

**Powers of the Body Corporate.**

Upon making and filing the articles of incorporation, as herein provided, the persons subscribing the same are incorporators, and authorized to carry into effect the objects specified in the articles, in the manner provided in this chapter; and they and their successors, associates, and assigns, by the name assumed in said articles, shall thereafter be deemed a body corporate, with power—

1. To sue and be sued;

2. To contract and be contracted with;

3. To have and use a corporate seal, and the same to alter at pleasure;

4. To purchase, possess, and dispose of such

real and personal property as may be necessary and convenient to carry into effect the objects of the incorporation, and to take, hold, and possess, and dispose of all real and personal property donated to such corporation by the United States, or by any state, territory, county, city, or other municipal corporation, or by any person, firm, association, or private corporation, for the purpose of aiding in the objects of such corporation;

5. To appoint such subordinate officers and agents as the business of the corporation may require, and prescribe their duties and compensation;

6. To make by-laws not inconsistent with any existing law for the sale of any portion of its stock for delinquent or unpaid assessments due thereon, which sale may be made without judgment, or execution; provided, that no such sale shall be made without thirty days' notice of the time and place of sale in some newspaper in circulation in the neighborhood of such company for the transfer of its stock, for the management of its property, and for the general regulations of its affairs;

7. In case the object or purpose for which any such corporation is incorporated is in whole or in part to construct, or construct and operate a railroad, to lease any part or all its road to any other company incorporated for the purpose of maintaining and operating a railroad, and to lease or purchase, maintain and operate any part or all of any other railroad constructed by any other company upon such terms and conditions as may be agreed upon between said companies respectively Any two or more railroad companies whose lines are connected may perfect any arrangement for their common benefit to assist and promote the object for which they were created; provided, that nothing in this act shall be con-



strued to authorize the leasing of any railroad line to any company or corporation owning a road which forms a competing or parallel line to its railroad. (L. 1864; D. p. 659, § 5; L. 1878, p. 90, § 1; L. 1887, p. 14, § 1; H. § 3221; B. & C. § 5056.)

Lord's Oregon Laws, Section 6841.

**Public Grounds, Streets, Etc., May be Appropriated.**

When it shall be necessary or convenient in the location of any road herein mentioned to appropriate any part of any public road, street, or alley, or public grounds, the county court of the county wherein such road, street, alley, or public grounds may be, unless the same be within the corporate limits of a municipal corporation, is authorized to agree with the corporation constructing the road, upon the extent, terms, and conditions upon which the same may be appropriated or used, and occupied by such corporation, and if such parties shall be unable to agree thereon, such corporation may appropriate so much thereof as may be necessary and convenient, in the location and construction of said road. (L. 1862; D. p. 666, § 26; H. § 3242; B. & C. § 5077.)

Lord's Oregon Laws, Section 6842.

**Streets, Etc., in Corporate Towns, Proceedings to appropriate.**

Whenever a private corporation is authorized to appropriate any public highway or grounds as mentioned in the last section, if the same be within the limits of any town, whether incorporated or not, such corporation shall locate their road upon such particular road, street, or alley, or public grounds, within such town as the local authorities mentioned in the last section and having charge thereof shall

designate; but if such local authorities shall fail or refuse to make such designation within a reasonable time when requested, such corporation may make such appropriation without reference thereto. (L. 1862; D. p. 666, § 27; H. § 3243; B. & C. § 5078.)

Bellinger and Cotton's Codes, Section 5068.

### Corporations Continue, After Dissolution, for Certain Purposes.

All corporations that expire by limitation specified in their articles of incorporation, or are dissolved by virtue of the provisions of section 5070, or are annulled by forfeiture or other cause by the judgment of a court, continue to exist as bodies corporate for a period of five years thereafter, if necessary for the purpose of prosecuting or defending actions, suits, or proceedings by or against them, settling their business, disposing of their property, and dividing their capital stock, but not for the purpose of continuing their corporate business. (L. 1862, D. Cd. p. 663, § 17; L. 1878, p. 91, § 2; H. C. § 3233.)

Bellinger and Cotton's Code, Sec. 5070.

### Majority May Determine Amount of Stock or Dissolve Corporation.

Any corporation organized under the provisions of this chapter may, at any meeting of the stockholders which is called for such purpose, by a vote of the majority of the stock of such corporation, increase or diminish its capital stock or the amount of the shares thereof, or authorize the dissolution of such corporation, and the settling of its business and disposing of its property, and dividing its capital stock in any manner it may see proper. (L. 1864, D. Cd. p. 663, § 19; L. 1866, p. 38, § 1; H. C. § 3235.)

The Charter of the City of Portland, January 23, 1903.

Duration of franchise and compensation therefor; terms of grant; city empowered to acquire plant or property.

Section 95. No franchise, lease or right to use the water front, ferries, wharf property, land under water, public landings, wharves, docks, highways, bridges, avenues, streets, alleys, lanes, parks or any other public place, either on, through, across, under, or over the same, nor other franchise shall be granted by the city to any private corporation, association or individual except as in this Charter otherwise provided, for a longer period than twenty-five (25) years nor without fair compensation to the city therefor, and in addition to the other forms of compensation to be therein provided the grantee may be required to pay annually to the city such percentage of the gross receipts arising from the use of such franchise and of the plant used therewith as may be fixed in the grant of said franchise. Every grant of a franchise shall fix the amount and manner of the payment of the compensation to be paid by the grantee for the use of the same and no other compensation of any kind shall be exacted for such use during the life of the franchise, but this provision shall not exempt the grantee from any lawful taxation upon his or its property, nor from any license, charges or impositions not levied on account of such use. Every grant of a franchise or right and every contract therefor made or granted under the provisions of this Charter shall provide that at the expiration of the term or period for which it is made or granted the city at its election and upon the payment therefor of a fair valuation thereof to be made in the

manner provided therefor in the grant or contract may purchase and take over to itself the property and plant of the grantee in its entirety and which may be situated on, in, above or under the streets and public places aforesaid or any thereof and used in connection therewith but in no case shall the value of the franchise of the grantee be considered or taken into account in fixing such valuation or such grant and contract in pursuance thereof may provide that upon the termination of said franchise, or right, granted by the city, the plant as well as the property, if any, of the grantee situated on, in, above or under the public places aforesaid and used in connection therewith shall thereupon be and become the property of the city without any compensation to the grantee, upon an ordinance duly enacted authorizing the same and upon its paying to the grantee said valuation; provided, however, that before the city shall have authority to take over such plant or property, the question whether or not the city shall acquire or take such plant and property shall first be submitted to the voters of the city in accordance with and subject to the foregoing limitations of this Article; and provided, further, that the question whether or not the city shall acquire or take such plant or property must be submitted to the voters of the city as above provided without such ordinance, whenever a petition shall be filed with the Council subscribed by a number of electors of the city equal to 15 per centum of the votes cast at the last preceding election asking that such question shall be submitted for approval or rejection to the vote of the people. Such ordinance must be passed or such petition filed within one year prior to the expiration of such grant or franchise and within a sufficient time before the expiration of such year so that if a special election is re-

quired to be held to pass upon such question, the same can be held within six months prior to such expiration. Such petition shall be sufficient if it conforms to the requirements of sections 53 and 54 of this Charter as to the petition therein provided for. Every grant reserving to the city the right to acquire the plant as well as the property, if any, of the grantee situated in, on, above or under the streets, avenues, or other public places of the city shall in terms specify the method of arriving at the valuation therein provided for and shall further provide that upon the payment by the city of such valuation the plant and property so valued, purchased and paid for shall become the property of the city by virtue of the grant and payment thereunder and without the execution of any instruments of conveyance and every such grant shall make adequate provision by way of forfeiture of the grant, or otherwise, or the effectual securing of efficient service and for the continued maintenance of the property in good order and repair throughout the entire term of the grant; but the terms of this section so far as they relate to the acquisition of the plant, property and business of the grantee shall not apply to the rights given railroads under sections 102 and 103 of this Charter.

Ordinance embodying franchise to be published.

Section 97. Before any grant of any franchise or right to use any highway, avenue, street, lane, or alley or other public property, either on, above or below the surface of the same shall be made, the proposed specific grant shall be embodied in the form of an ordinance, with all the terms and conditions, including all provisions as to rates, fares and charges, if any, which proposed ordinance shall be published in full at the expense of the applicant

for the franchise, at least twice in the city official newspaper. Such publication shall take place and be completed not less than twenty nor more than ninety days before the final passage of such ordinance, and such ordinance shall require for its passage the affirmative vote of at least two-thirds of all the members of the Council, as shown by the "yeas" and "nays", and the approval of the Mayor before it shall be valid for any purpose; but in case the Mayor should veto any such ordinance it can only be passed over such veto by a four-fifths vote of all the members of said Council, in which case the same may be valid without the Mayor's approval from any (and) after such passage. No amendment to any franchise after publication shall be valid unless the ordinance as amended shall be republished in like manner and for like time as the original.

Taxation; requirements of all franchises; street repair, abandonment.

Section 100. Every franchise granted under this Charter shall be taken and deemed as property and shall be subject to taxation as property. Franchises granted to persons or corporations to construct, maintain and operate street railways and other railways and tramways shall provide that the grantee of the franchise or his or its assigns, representatives and successors shall keep those portions of the streets or other public places occupied by said street railways or other railways or tramways in good repair and as required by the Council, and that all persons or corporations to whom franchises are granted to lay down tracks for street railways or other railways and their or its representatives or successors, shall during the life of such franchise, plank, pave, repave, reconstruct or otherwise improve or repair or maintain in good condi-



tion and in the manner directed by the Council and by the Executive Board the whole or any portion of the streets along or over which said street railways or other railways shall be constructed, lying between the rails of any track thereof and extending one foot outside of such rails, and also the portions of the street lying between any two tracks; but in the cases of the franchise or rights granted under sections 102 and 103 of this Charter it may be provided in said franchise that said grantee or his or its assigns, representatives and successors shall pave, repave and keep in repair as required by the Council the streets used by such railroad from curb to curb.

Such franchise shall contain a provision that in the event any street, or portion of a street, of other public place, granted by said franchise and used by such grantee, his or its representatives and successors, shall during the life of the franchise be abandoned by such grantee, his or its successors or assigns, such grantee, or his or its successors or assigns shall forthwith be required to remove its tracks and other property therefrom and on the removal thereof restore, repair or reconstruct that portion of the street which under his, its or their franchise was to be kept in repair by the grantee, their, his or its successors or assigns so that it shall be placed in such condition as may be required by the Council and shall contain a provision to the effect that a failure to comply within a reasonable time with any of the provisions or conditions of such franchise shall authorize the city to declare an immediate forfeiture of such franchise and in the case of said street railways, or other railways or tramways the road or track constructed thereunder shall likewise be forfeited, or in case of such failure or neglect or refusal of the grantee after thirty days' notice given by

the Council to repair, improve or maintain as above set out the portions of the streets above described then that the said city may at its option do such work and the cost of the same as ascertained and declared by the Council shall be entered in the docket of City Liens and enforced in like manner and with like effect as a general tax upon real or personal property of the grantee after delinquency.

If any street or public place be abandoned as aforesaid, that portion of the franchise under which said street or public place was used by the grantee or his successors shall thereafter be null and void, and shall be forfeited without any further action on the part of the city. On any street or public place being abandoned as aforesaid, the City Engineer shall forthwith file with the Auditor a certificate, giving date of abandonment and description of the street or public place so abandoned, and the Auditor shall forthwith file the same and enter a notation thereof on the records of such franchise in his office. Such franchise shall also contain a provision that if electrical currents are used or employed in or about the use of said franchise or the plant connected therewith, then that the said grantee, his, its or their successors or assigns shall provide and put in use such means and appliances as will control and effectually contain such currents in their proper channels and on his, its or their own wires, tracks and other structures (so as to prevent injury to the property, pipes and other structures belonging to the City of Portland or to any person, firm or corporation within said city and to repair and renew said means and appliances and from time to time change and improve the same as may be necessary to accomplish said purpose, all at his, its or their charge and expense and at his, its or their own risk, selecting and adopting such means and

appliances as shall prevent injury to the property, pipes and other structures belong (belonging) to said City of Portland or to any person, firm or corporation.

Further requirements to be stated in ordinance; time of construction; cost; and time of completion of work in certain cases.

Section 101. In addition to the conditions otherwise required by this Charter and such other conditions as may be prescribed by the Council, franchises must provide for the time of beginning the construction of work thereunder, the estimated total cost of such work, the monthly or yearly sums of money to be expended thereon, and in case of franchise running to railroad companies, street-car companies and other companies, covering certain streets or portions of streets in such franchises described, fix the time within which the work to be done under such franchise shall be completed upon such streets or portions of streets so described therein.

Council empowered to make agreements with railroads as to use of streets.

Section 103. The Council has power and authority by ordinance duly passed to agree with any corporation, firm or person constructing a commercial railroad and desiring to enter the city, upon the extent, terms and conditions upon which the streets, alleys or public grounds of the city may be appropriated, used or occupied by such railroad, and upon the manner, terms and conditions under which the cars and locomotives of such railroad may be run over and upon such streets, alleys and public grounds; such agreement shall be subject to the provisions and requirements of sections 95, 97, 100 and 101 of this Charter. No

exclusive right for the aforesaid purposes shall be granted to any corporation, firm or person and the use of all such rights shall at all times be subject to regulation by the Council.

In addition to the other requirements of this Charter, every ordinance granting such right shall be upon the condition that such grantee shall allow any other railroad company to use in common with it the same track or tracks upon obtaining the consent of the Council expressed by ordinance, each paying an equitable and proper portion for the construction and repair of the tracks and appurtenances used by such railroad companies jointly.

#### Forfeiture of franchises not used.

Section 106. All franchises or privileges heretofore granted by the city which are not in actual use or enjoyment or which the grantees thereof have not in good faith commenced to exercise are hereby declared forfeited and of no validity unless said grantees or their assigns shall within six months after this Charter takes effect, in good faith commence the exercise or enjoyment of such grant or franchise. Nothing in this Charter contained shall affect the validity of any franchise, right or privilege in actual use or enjoyment heretofore given or granted by any former or the present City of Portland or by the City of East Portland or by the City of Albina, and the same shall be and continue in force and effect as given or granted by said cities or either of them.

#### Section 6735, Lord's Oregon Laws:

"Any foreign corporation incorporated for the purpose of constructing or constructing and operating, or for the purpose of or with the power of acquiring and operating, any railway, macadamized road, plank road, clay

road, canal, or bridge, or for the purpose of conducting water, gas, or other substance by means of pipes laid under the ground, shall, on compliance with the laws of this state for the regulation of foreign corporations transacting business therein, have the same rights, powers, and privileges in the exercise of the rights of eminent domain, collection of tolls, and other prerogative franchises, and in the control, management, and disposition of their business franchises and property, as are possessed by corporations organized for similar purposes under the general incorporation laws of this state; *provided* always, that in the case of the leasing of any line of railroad incorporated under the laws of this state by a foreign corporation, such leasing shall be upon the fundamental condition following, and not otherwise:

1. That such foreign corporation shall enter into an agreement in writing with the state of Oregon, duly executed by said corporation, to be signed by its president and attested by its secretary, which agreement shall be filed with the secretary of state of the state of Oregon, whereby and wherein said foreign corporation shall agree that in all suits or actions, by and between said foreign incorporation and a citizen or citizens of this state, during the continuance of such lease, shall be prosecuted or defended to a final determination in the courts constituted by the laws of this state, excepting in cases when such action or suit shall be commenced in or removed to the federal courts by a citizen of this state, and upon the failure to comply with the terms of such agreement by such foreign corporation, such lease shall utterly determine and be rendered null and void at the option of the legislative assembly of the state of Oregon;

2. That the state of Oregon reserves to itself, through its legislative assembly, and in

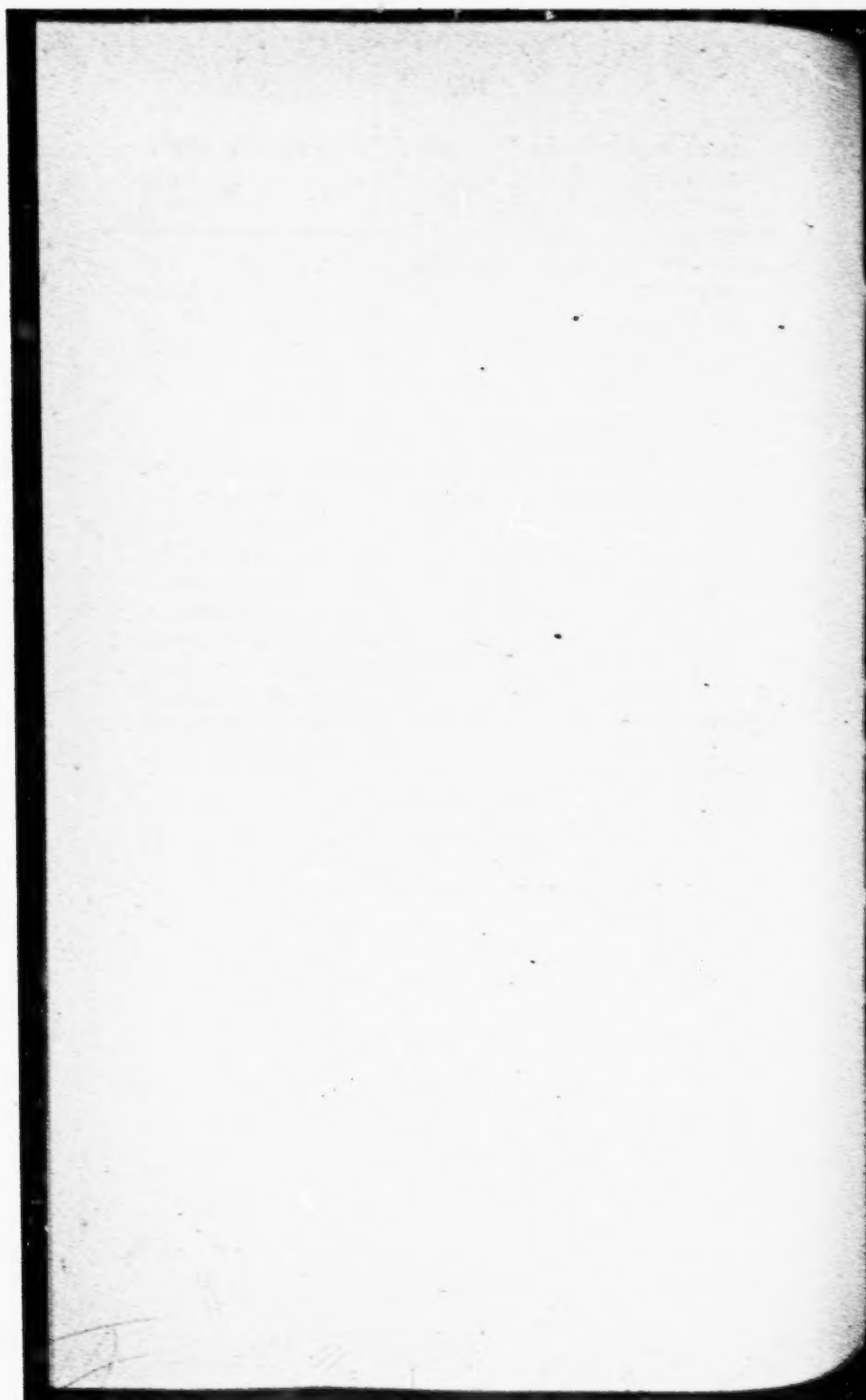


such manner as it shall determine, the right, power, and authority to prescribe the rate to be charged for the transportation of persons and property on such leased lines, and also to prescribe and make such police regulations for the government of such roads as it may from time to time determine. (L. 1878, p. 95, Sec. 1; L. 1887, p. 13, Sec. 1; H. Sec. 3293; B. & C. Sec. 5120.)

**Section 6736, Lord's Oregon Laws:**

"Nothing in this act contained shall be so construed as to give to any foreign corporation or corporations any other or further rights, powers, or privileges than may be acquired or exercised by corporations incorporated under the laws of this state; but only so as to give to foreign corporations the same rights, powers, and privileges, on a compliance with the laws of this state, as may be acquired or exercised by corporations incorporated under the laws of this state. (L. 1878, p. 96, Sec. 2; H. Sec. 3294; B. & C. Sec. 5121.)





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U.S. Supreme Court, D. C.  
FILED.

JAN 6 1913

JAMES H. McKENNEY,  
CLERK.

IN THE  
**SUPREME COURT OF THE UNITED STATES.**

OCTOBER TERM, 1912.

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**No. 122.**

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**SOUTHERN PACIFIC COMPANY, APPELLANT,**

**vs.**

**CITY OF PORTLAND, APPELLEE.**

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**APPEAL FROM THE CIRCUIT COURT OF THE UNITED STATES  
FOR THE DISTRICT OF OREGON.**

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**REPLY BRIEF FOR APPELLANT.**

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1. This franchise was granted by the State of Oregon under the terms and provisions of sections 24 and 25 of the act of the Legislative Assembly of the State of Oregon, passed October 14, 1862, which are now sections 6841 and 6842 (Lord's Oregon Laws), and are as follows:

"Section 6841. When it shall be necessary or convenient in the location of any road herein mentioned, to appropriate any part of any public road, street or alley, or public grounds, the county court of the county wherein such road, street, alley or public grounds may be, unless the same be within the corporate limits of a municipal corporation, is authorized to agree with the corporation constructing the road, upon the extent, terms and conditions upon which the same may be appropriated or used, and occupied by such corporation, and if such parties shall be unable to agree thereon, such corporation may appropriate so much thereof as may be necessary and convenient, in the location and construction of said road."

"Section 6842. Whenever a private corporation is authorized to appropriate any public highway or grounds as mentioned in the last section if the same be within the limits of any town, whether incorporated or not, such corporation shall locate their road upon such particular road, street or alley or public grounds, within such town, as the local authorities mentioned in the last section, and having charge thereof shall designate; but if such local authorities shall fail or refuse to make such designation within a reasonable time when requested, such corporation may make such appropriation without reference thereto."

Point II. The grant by the State of this franchise or right to appropriate and use the part of Fourth street so designated by ordinance No. 599 when it was accepted and acted upon by the railroad company and valuable improvements made and money expended on the faith thereof, became a contract between the State and the company which cannot be impaired either by law of the State or by an ordinance of the city.....	18
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CITY OF PORTLAND, APPELLEE.

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APPEAL FROM THE CIRCUIT COURT OF THE UNITED STATES  
FOR THE DISTRICT OF OREGON.

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**REPLY BRIEF FOR APPELLANT.**

---

This is a suit to enjoin the City of Portland from enforcing ordinance No. 16491 of said city, enacted on the first day of May, 1907, making it "unlawful for the Oregon Central Railroad Company of Portland, Oregon, its successors, assigns, or their lessees or other person, firm, or corporation to run or operate steam locomotives or freight cars over, upon, or along Fourth street between Glisan street and the southerly limits of the city of Portland from and after eighteen months from the final passage or approval of this ordinance,

excepting freight cars for the reconstruction, repair, or maintenance of the railway lawfully and rightfully on said street."

The facts which form the basis of this suit are substantially as follows:

The Legislative Assembly of the State of Oregon on the 14th of October, 1862, passed an act entitled "An act providing for private incorporations and the appropriation of private property therefor" (Rec., pp. 295-305).

The sections of this act so far as applicable to this case are as follows:

"SECTION 4. The articles of incorporation shall specify:

"(1) The name assumed by the corporation and by which it shall be known, and *the duration of the corporation if limited.*

"(6) If the corporation is formed for the purpose of \* \* \* making or constructing any railroad, \* \* \* *the termini of such road.*

"SECTION 5. Upon the making and filing of the articles of incorporation as herein provided, the persons subscribing the same are corporators, and authorized to carry into effect the object specified in the articles, in the manner provided in this act; and they and their successors, associates and assigns by the name assumed in such articles shall thereafter be deemed a body corporate with power:

"(4) To purchase, possess and dispose of such real and personal property as may be necessary and convenient to carry into effect the object of the incorporation.

"SECTION 24. When it shall be necessary or convenient in the location of any road herein mentioned, to appropriate any part of any public road, street or alley, or public grounds, the county court of the county wherein such road, street, alley or public grounds may be, unless the same be within the corporate limits of a municipal corporation, is authorized to agree with the corporation constructing the road, upon the extent, terms and conditions upon which the same may be appropriated or used, and oc-

cupied by such corporation, and if such parties shall be unable to agree thereon, such corporation may appropriate so much thereof as may be necessary and convenient, in the location and construction of said road.

"SECTION 25. Whenever a private corporation is authorized to appropriate any public highway or grounds, as mentioned in the last section if the same be within the limits of any town, whether incorporated or not, *such corporation shall locate their road upon such particular road, street or alley, or public grounds, within such town, as the local authorities mentioned in the last section, and having charge thereof shall designate; but if such local authorities shall fail or refuse to make such designation within a reasonable time when requested, such corporation may make such appropriation without reference thereto*" (Record, pp. 300, 301).

On the 23d day of November, 1866, the Oregon Central Railroad Company of Portland filed its articles of incorporation and was incorporated under the provisions of the aforesaid act of the legislature. The provisions of the said articles of incorporation so far as applicable to this case are as follows:

1st. "The corporation hereby created shall be known as the Oregon Central Railroad Company, and *its duration unlimited.*

2d. "The object and business of the corporation shall be to construct and operate a railroad from the city of Portland through the Willamette Valley to the southern boundary of the State; under the laws of Oregon, and law of Congress recently passed granting land and aid for such purpose.

3d. "The corporation shall have its principal office in the city of Portland.

6th. "The termini of the railroad proposed to be constructed by said company shall be for the northern end, at the city of Portland, and for the southern end at some point on or near the southern boundary of the State, as may be hereafter determined by actual survey (Record, p. 249).

This company commenced the construction of its railroad at the southern boundary of the city in April, 1868, and continued until the grading was completed and all bridges completed to the town of Hillsboro, Washington county. The company had entered into a contract with John H. Couch for ten blocks of land in the north end of the city as terminal grounds, and to reach these grounds it was necessary to select a route through the city. To that end the company applied to the city council to have it designate by ordinance in accordance with section 25, *supra*, Fourth street as the street upon which the company should locate its road (Record, pp. 42, 43).

Pursuant to this application of the company the city council of the city of Portland on the 6th day of January, 1869, passed ordinance No. 599, in words and figures as follows, to wit:

"An Ordinance Authorizing the Oregon Central Railroad Company, of Portland, to lay a railway track and run cars over the same, within the city of Portland.

"The City of Portland does ordain as follows:

"Franchise-Route.

"SECTION 1. The Oregon Central Railroad Company, of Portland, Oregon, is hereby authorized and permitted to lay a railway track and run cars over the same along the center of Fourth street, from the south boundary line of the city of Portland, to the north side of 'G' street, and as much farther north as said Fourth street may extend or be extended, upon the terms and conditions as hereinafter provided.

"Grade and Repairs.

"SECTION 2. The said railroad company shall grade to established grades, construct and maintain in good repair said street, at least six feet in width upon each side of the center line of said street, and

as much wider as may be affected by said railway or the construction thereof, and shall do and perform said work and the improvement and the repair thereof in such manner and as often as the common council of the city of Portland may at any time provide for or require.

"SECTION 3. The common council reserve the right to make or to alter regulations at any time as they deem proper for the conduct of the said road within the limits of the city, and the speed of railway cars and locomotives within said limits, and may restrict or prohibit the running of locomotives at such time and in such manner as they may deem necessary.

"SECTION 4. All alterations of grades or streets required for laying said railroad track, and all improvements and repairs of the same for said purpose, shall be made at the expense of the said railroad company, and the same shall be made as may be provided by ordinance.

"SECTION 5. It is hereby expressly provided that any refusal or neglect of the said Oregon Central Railroad Company to comply with the provisions and requirements of this ordinance, or any other ordinance passed in pursuance hereof, shall be deemed a forfeiture of the rights and privileges herein granted; and it shall be lawful for the common council to declare by ordinance, the forfeiture of the same, and to cause the said rails to be removed from said street.

"Approved January 6th, 1869."

After the passage of said ordinance the company located its station or northern terminus on block seven at the then northern boundary of Portland, and began to extend its road southerly over Fourth street, putting in the improvements provided by said ordinance, and expended a large amount of money thereon. The grade on Fourth street was completed in 1870 or 1871 (Rec., pp. 44, 45, 46). The company first began to operate its trains over Fourth street in the year 1871.



On the 4th day of May, 1870, Congress passed an act entitled "An act granting lands to aid in the construction of a railroad and telegraph line from Portland to Astoria and McMinnville, in the State of Oregon" (Rec., pp. 433-435).

Section 1 of this act of Congress is as follows:

"That for the purpose of aiding in the construction of a railroad and telegraph line from Portland to Astoria, and from a suitable point of junction near Forest Grove to the Yamhill river, near McMinnville, in the State of Oregon, there is hereby granted to the Oregon Central Railroad Company, now engaged in constructing the said road, and to their successors and assigns, the right of way through the public lands of the width of one hundred feet on each side of said road, and the right to take from the adjacent public lands materials for constructing said road, and also the necessary lands for depots, stations, side tracks, and other needful uses in operating the road, not exceeding forty acres at any one place, and also each alternate section of public lands, not mineral, excepting coal or iron lands, designated by odd numbers nearest to said road, to the amount of ten such alternate sections per mile, on each side thereof, not otherwise disposed of or reserved or held by valid pre-emption of homestead right at the time of the passage of this act. And in case the quantity of ten full sections per mile cannot be found on each side of said road, within the said limits of twenty miles, other lands designated as aforesaid shall be selected up to the direction of the Secretary of the Interior on either side of any part of said road nearest to and not more than twenty-five miles from the track of said road to make up such deficiency" (Rec., p. 434).

After the City of Portland designated Fourth street as the street upon which the company should locate its road, the company proceeded to construct its road from the northern terminus at or near the northern boundary of the city of Portland southerly along Fourth street, and thence southerly to St. Joseph, on the Yamhill river, near McMinnville, as

called for by the said act of Congress; and under the said grant from the legislature and under said act of Congress it operated its railroad over said line continuously from the year 1871, running passenger and freight trains thereon, with steam locomotives as a motive power, moving intrastate and interstate commerce thereon until the 6th day of October, 1880.

On March 16, 1870, the Oregon & California Railroad Company filed its articles of incorporation, and was incorporated under the laws of the State of Oregon, with its principal office for the transaction of business at Portland, Oregon, and on the 22d day of May, 1879, and the 5th day of July, 1883, it filed supplementary articles of incorporation (Rec., pp. 251-259). By the provisions of the original and supplementary articles of incorporation of the Oregon & California Railroad Company it was authorized and empowered, among other things, to purchase or lease or operate and maintain, on such terms as might be agreed upon, the railroad and telegraph lines, or any part thereof, of the Oregon Central Railroad Company as the same was then or might thereafter be constructed and extended.

On the 6th day of October, 1880, the Oregon Central Railroad Company transferred and conveyed to the Oregon & California Railroad Company, its successors and assigns, all of the railroad of the said Oregon Central Railroad Company theretofore constructed, including its rights acquired on Fourth street under said act of the legislature, as evidenced by ordinance No. 599. The Oregon and California Railroad Company, after taking over this railroad, continued to operate the same, and to run freight and passenger cars thereon by steam locomotive power from that date until the first day of July, 1887, when it assigned, transferred, and leased to the Southern Pacific Company, appellant, for the term of forty years from that date, its lines of railroads, including the line of the Oregon Central Railroad Company and the Oregon & California Railroad Company from its northerly

terminus at the intersection of Fourth street and North Front street, in the city of Portland, along Fourth street to Sheridan street, in said city, thence by way of Beavertown, Hillsboro, Forest Grove, and McMinnville to Corvallis, Oregon, together with all the rights and franchises theretofore granted to the Oregon Central Railroad Company under the laws of the State of Oregon, and as designated under said ordinance No. 599, and the Southern Pacific Company thereupon entered into the exclusive possession of said railroad and franchise and rights, and has ever since been and is now operating and maintaining the same, and running passenger and freight cars thereon moved by steam locomotives, as a common carrier for hire, and engaged in the transportation of interstate and intrastate commerce thereon. Up to the time of the passage of the ordinance complained of, the Oregon Central Railroad Company, its successors and assigns, fully complied with the terms and conditions of said grant and said ordinance No. 599, and had expended, upon the faith thereof, in the construction of said road on Fourth street and in improvements ordered and directed by the city of Portland, and in the renewal of said road from the north end of said Fourth street to the southerly boundary of said city, a sum in excess of \$133,000.

On the first day of May, 1907, the City of Portland, over the protest of the Oregon & California Railroad Company, as owner, and the Southern Pacific Company, as lessee, enacted ordinance No. 16491, which is as follows:

"An ordinance prohibiting the operation of steam locomotives and freight cars on Fourth street between Glisan street and the southerly limits of the city of Portland after eighteen months from the date of the passage of this ordinance, and providing a penalty for the violation thereof.

"The City of Portland does ordain as follows:

"SECTION 1. It shall be unlawful for the Oregon Central Railroad Company of Portland, Oregon, its successors, assigns, or their lessees, or any other per-

son, firm or corporation, to run or operate steam locomotives or freight cars over, upon or along Fourth street between Glisan street and the southerly limits of the city of Portland, from and after eighteen months from the final passage and approval of this ordinance, excepting freight cars for the reconstruction, repair or maintenance of the railway lawfully and rightfully on said street.

"SECTION 2. Any violation of the provisions of this ordinance by the owners, officers, agents or employees of said Oregon Central Railroad Company, or its successors, assigns, or lessees or any other person, firm or corporation, by so running or operating steam locomotives or freight cars (other than those excepted in section 1 hereof), or attempting to run or operate the same on said Fourth street after the time mentioned in section 1 of this ordinance, shall be punishable by a fine of not less than \$250.00 nor more than \$500.00, or by imprisonment for not more than six months, or by both such fine and imprisonment, and each day's running or operating, or attempting to run or operate such steam locomotives or freight cars shall constitute a separate offense and such violation shall be deemed a forfeiture of any and all rights and privileges claimed by said Oregon Central Railroad Company with respect to the operation of any railway on said street.

"SECTION 3. Said ordinance shall not be construed so as to recognize, assent to, affirm, confirm, ratify or extend any right, franchise or privilege relative to the maintenance or operation of any railway or the use, operation, or running of any railway car or cars, motor or motors, locomotive or locomotives, or other railway vehicle or vehicles in, on, over, along or upon said Fourth street heretofore, now or hereafter claimed, alleged or set up by any person, persons, firm or corporation" (Rec., pp. 8, 9).

On the 16th day of November, 1908, the City of Portland, acting through its city attorney and chief of police, caused to be filed in the municipal court of said city a complaint charging in substance that the Southern Pacific Company

and James P. O'Brien, as general manager thereof, in the State of Oregon, on said day did violate the said ordinance No. 16491, in that the said corporation and the said James P. O'Brien, as such officer and manager, "did wilfully and unlawfully run and operate steam railway locomotives upon and along Fourth street between the south boundary line of said city and the south line of Glisan street in said city of Portland, and within the corporate limits of said city of Portland," etc. (Rec., pp. 9-10).

The bill of complaint alleges and it is admitted in the answer of the city that a warrant was issued upon said complaint for the arrest of James P. O'Brien as the general manager of the Southern Pacific Company, and that on said day he was arrested upon said warrant, and that the City of Portland, acting by and through its mayor and chief of police, threatened and intended to, and that it would unless restrained by order of court, enforce the said ordinance in the manner therein provided.

On the filing of the bill a restraining order was issued restraining the city from enforcing said ordinance pending the trial and determination of said cause. The city thereupon filed its answer and, after denying certain allegations of the bill and setting up certain affirmative matter, alleged, in substance, that ordinance "No. 16491 was enacted by the council of the city of Portland under and by virtue of the authority of and pursuant to the reserve powers in said ordinance No. 599, and in the proper and reasonable exercise of the police powers of the city of Portland for the protection of property and the lives, health, safety, and comfort of the citizens thereof and the public generally" (Rec., pp. 19-25), and the Southern Pacific Company having filed its replication to said answer, the cause was heard upon the pleadings and evidence taken in open court, and the court rendered a decision sustaining the validity of said ordinance on two grounds:

First. Upon the ground that it was within the powers reserved to the city in ordinance No. 599,

Second. That the passage of said ordinance was within the reasonable and necessary police power of the city.

The court thereupon dismissed the bill, but continued in force the restraining order pending the determination of this case upon this appeal.

The pleadings and record in this case are voluminous, but the issues involved may be brought within a narrow compass. The questions involved in this case are principally questions of law.

### APPELLANT'S CONTENTIONS.

Appellant contends that:

#### I.

Sections 24 and 25 of the act of the Legislative Assembly of the State of Oregon, passed October 14, 1862, which are now secs. 6841 and 6842, Lord's Oregon Laws, granted to the Oregon Central Railroad of Portland, its successors and assigns, the right to appropriate so much of any public street of the city of Portland, Oregon, as might be necessary and convenient in the location and construction of its road, subject, however, to the right of the city under said act, in the first instance, to designate the particular street upon which the railroad company should locate its road.

#### II.

Under said Ordinance No. 599 the Common Council of the city of Portland designated Fourth street as the particular street within the city upon which said railroad company should locate its road.



## III.

The grant by the State of this franchise or right to appropriate and use the part of the street so designated, when it was accepted and acted upon by the railroad company and valuable improvements made on the faith of said grant, became a contract between the State and the company which could not be impaired either by law of the State or by an ordinance of the city, and a vested property right which could be assigned, mortgaged or leased as other property, and as such was and is entitled to all the constitutional protection afforded other contracts and property rights.

## IV.

The franchise thus granted was and is perpetual.

## V.

A granting by the State of a franchise or right to a railroad company to appropriate and use a public street of a city is subject to the reasonable and necessary exercise of the police power of the State by appropriate action to protect the public health and the public safety, but any regulations adopted by virtue of the exercise of police power must be such only as are necessary to preserve the public welfare, and must be reasonable and must not be such as to defeat the purposes of the grant; and if regulations enacted for such purpose operate to impair a contract between the State and the company, or to deprive it of its franchise, or to deny it the equal protection of the laws, they are unconstitutional and void.

## VI.

Ordinance No. 16491, the declared purpose of which is to prohibit "the operation of steam locomotives and freight cars on Fourth street," is not a reasonable or necessary exer-

cise of the police power of the State or city to regulate the use of the railroad on said street, with a view to the public welfare, but it is unreasonable and such as operates to defeat the purposes of the grant from the State and is void in that—

(a) It impairs the obligation of the contract under which the street was appropriated by the company and under which it located and operated its road thereon.

(b) It deprives the company of its property—said franchise—without due process of law and denies it the equal protection of the laws.

(c) Its enforcement will interfere with, restrain, and prevent the movement by the company of, interstate commerce.

### **APPELLEE'S CONTENTIONS.**

Appellee contends that:

#### **I.**

On January 6, 1869, at the time ordinance No. 599 of the City of Portland was passed, it had no authority to grant a franchise to a railroad company or to appropriate any of the streets of the city, and that sections 24 and 25 of the act of the Legislative Assembly of the State of Oregon, passed October 14, 1862, which are now sections 6841 and 6842, Lord's Oregon Laws, is not a franchise, but a license, and that said ordinance is merely a license or permission to the Oregon Central Railroad Company to use Fourth street revocable at any time, and that therefore the said railroad company had no franchise or contract within the meaning of the Federal Constitution which could be impaired (Appellee's Brief, pp. 4, 80, 81, and 140).

#### **II.**

Section 3 of ordinance No. 599 reserved to the city the power to prohibit the running or operation of steam locomotives or freight cars over Fourth street (Appellee's Brief, p. 5).

## III.

Under subdivision one of section 73 of an act of the legislature of the State of Oregon entitled "An act to incorporate the City of Portland, Multnomah County, State of Oregon, and to provide a charter therefor, and to repeal all acts and parts of acts in conflict therewith," passed January 23, 1903, providing that "the council has power and authority, subject to the provisions, limitations, and restrictions in this charter contained:

- "(1) To exercise within the limits of the City of Portland all the powers commonly known as the police power to the same extent as the State of Oregon has or could exercise said power within said limits,"

the city of Portland had the power to prohibit the running or operation of steam locomotives or freight cars over Fourth street (Appellee's Brief, pp. 10 and 141).

## IV.

Whatever rights were given the company under the said act of the legislature of October 14, 1862, and the said ordinance No. 599 were not assignable (Appellee's Brief, p. 141).

## ARGUMENT.

## I.

The franchise or right granted the Oregon Central Railroad Company to appropriate and use the portion of Fourth street designated in ordinance No. 599 for the purpose of constructing and operating its railroad thereon is a grant direct from the State of Oregon and not from the city of Portland.

Appellant contends, the lower court held, and appellee concedes, that at the time of the passage of ordinance No. 599 the City of Portland had no authority given it to grant franchises for the construction or operation of railroads on its streets. It is provided by sections 6841 and 6842 of Lord's Oregon Laws that a corporation organized for the purpose of constructing a railroad may appropriate so much of any public street of a city or town as may be necessary or convenient in the location and construction of its road, subject, however, to the right of the city or town under said sections, in the first instance, to *designate* the particular street upon which the railroad company shall locate its road. But it is provided in section 6842 that "If such local authorities fail or refuse to make such *designation* within a reasonable time when requested, such corporation may make such appropriation without reference thereto." Some States have a constitutional or statutory requirement that no railroad shall be constructed within the limits of any city *without the consent of the local authorities*, and it has been repeatedly held that under such constitutional or statutory requirement the franchise or right to use the streets flows from the State and not from the municipality, and that this requirement is not a grant of authority to the municipality to create and grant franchises in the streets.

Dillon on Municipal Corporations, section 1228, 5th edition.

The court will note the difference between such constitutional or statutory requirement and the provisions of section 6842 of Lord's Oregon Laws. At the time ordinance No. 599 was passed and the Oregon Central Railroad Company appropriated, constructed, and operated its road on Fourth street there was no limitation on the right of a railroad company to appropriate a public street in a city or town in the State of Oregon save and except that contained in section 6842; and that was not a limitation affecting the grant from the State, but a mere right given to the city in the first instance to *designate* the particular street over which the railroad should be located. The language used in sections 6841 and 6842 constitutes a clear and definite grant of authority to railway companies to occupy and use the public streets of a town or city for railway purposes. It is a grant of the legislature to such company, not a grant of power to the city to grant such authority. When a corporation is organized for the purpose of constructing and operating a railroad the grant is in the nature of a floating grant until such time as the local authorities of the city or town designate the particular street over which the railroad shall be located, or until such time as the corporation shall appropriate the street in case the local authorities fail or refuse to make such designation. The moment the street is designated and accepted by the corporation the grant attaches as a present grant. The provision of section 6842 (*supra*) that "such corporations shall locate their road upon such particular street \* \* \* within such town as the local authorities \* \* \* having charge thereof shall designate" is not a grant of authority to the town or city to create and grant franchises in its streets; it is a mere authority given to the city in the first instance to designate the particular street to which the grant of the legislature attaches.

"When the legislature has regulated the terms and conditions upon which the streets of the municipality may be used by a railroad or other public-

service corporation, the city council or other officials charged with the duty of giving municipal consent to a construction of the public utility *cannot impose other or different conditions* which are inconsistent with those prescribed by the legislature."

Dillon on Municipal Corporations, fifth edition, section 1230.

This being the rule, when the construction of a railroad within the limits of a city is made dependent upon municipal consent, it certainly would apply with greater force under a provision of statute such as is contained in section 6842, where the power of the city is limited to the right to *designate* the particular street upon which the road shall be located and where a railroad company may appropriate so much of any street in a city as may be necessary and convenient in the location and construction of its road in the event that the local authorities refuse to make such designation. The only conditions the city was authorized to impose at the time of the passage of ordinance 599 were conditions in the nature of police regulations and not conditions affecting or limiting the grant from the State. Had the legislature of the State of Oregon, instead of limiting the power of the city to the right to designate the particular street over which a railroad should be located, as it did in section 6842, provided that a railroad company should not construct a railroad over the streets and highways of a city or town *without the consent* of the city, then, to use the language of Justice Lamar in the case of *Louisville vs. Cumberland Telephone Company*, 224 U. S., 649, such provision would have given the "municipality ample authority to deal with the subject, and by virtue of this statutory power it could have imposed terms, which the company might have been unable or unwilling to accept, in which event the franchise granted by the State would have been nugatory." But such power was not granted to the City of Portland directly or indirectly. It only had the power to *designate the partic-*



ular street over which the road should be located. It is submitted, therefore, that the city, not having been granted the power directly to impose or attach any condition by ordinance that would operate to defeat the grant of the State, could not, under the guise of the police power, adopt any regulation or impose any condition that would operate to defeat such grant. The city being powerless to withhold its consent to the use of its streets by such public-service corporation, and having no power to attach any condition which would operate to defeat the grant from the State, it will be presumed that the provisions of ordinance No. 599 were adopted with two purposes only in view, namely, *first*, to designate the particular street over which the Oregon Central Railroad Company should locate its road pursuant to the authority granted the city in section 6842 of Lord's Oregon Laws, and, *second*, the adoption of only such regulations by virtue of the exercise of the police power, as were necessary to preserve the public welfare, and not such regulations as would operate to defeat the purposes of the grant.

## II.

The grant by the State of this franchise or right to appropriate and use the part of Fourth street so designated by ordinance No. 599, when it was accepted and acted upon by the railroad company and valuable improvements made and money expended on the faith thereof, became a contract **BETWEEN THE STATE AND THE COMPANY** which could not be impaired either by a law of the State or by an ordinance of the city.

In the case of *Mayor of Knoxville vs. Africa*, 77 Fed., 501, Lurton, circuit judge, speaking for the Circuit Court of Appeals, Sixth Circuit, said:

"A right of way upon a public street whether granted by act of the legislature, or ordinance of city council, or in any other valid mode, is an easement,

and as such is a property right capable of assignment, sale, and mortgage, and entitled to all the constitutional protection afforded other property rights and contracts.

"A legislative grant of the right to use city streets for a public service upon condition of the performance of the service by the grantee when accepted and acted upon by the grantee is a contract between the grantee and the State, which is protected by the Constitution of the United States and which cannot be impaired by subsequent legislation."

Dillon on Municipal Corporations, 5th ed., section 1242.

### III.

**The franchise granted by the State of Oregon to the Oregon Central Railroad Company was one in perpetuity.**

Section 4 of the act entitled "An act providing for private corporations and the appropriation of private property therefor" provides:

"SECTION 4. The articles of incorporation shall specify:

"1. The name assumed by the corporation and by which it shall be known and the *duration of the corporation if limited*" (Record, p. 296).

Paragraph 1 of the articles of incorporation of the Oregon Central Railroad provides:

"1st. The corporation hereby created shall be known as the Oregon Central Railroad Company, and *its duration unlimited.*"

In the case of *Louisville Trust Company vs. City of Cincinnati*, 76 Fed., 296, the Circuit Court of Appeals for the Sixth Circuit, speaking through Circuit Judge Lurton, said:

"The grant under the ordinance of December, 1871, was unlimited as to time. There was at that time no statutory restriction upon the power of a city

to grant an unlimited street easement to either a railroad or street car company, having the requisite franchises from the State. The act limiting the power of a city to a term not exceeding twenty-five years was not passed until May 14th, 1878. Neither do we think there was any implied restriction upon the power of the city springing from reasons of public policy. The corporation to which this grant was made was perpetual, and we see no sufficient reason which would justify the court in holding that it was not within the discretion of the municipal government to grant to such a company an unlimited easement upon the streets."

In the case of *Louisville vs. Cumberland Telephone Co.*, 224 U. S., 649, 662, Mr. Justice Lamar, speaking for the court, says:

"The plaintiff in error makes the further contention that its general demurrer should have been sustained and the bill dismissed because the original grant of street rights, having been indefinite as to time, was either void *ab initio*, or revocable at the will of the general council, or that it expired in 1893 when (Ky. Stat., 1909, sec. 2742) Louisville was made a city of the first class with new and enlarged power. In support of this proposition numerous decisions are cited, in some of which it appeared that a State had chartered a public utility corporation, but the city by ordinance had given an exclusive or perpetual grant of a street franchise which was held to be void because made in excess of the statutory power possessed by the municipality. In others the company had been incorporated for thirty years, and the street right was held to have been granted only for that limited period. In others it was decided that such privileges terminated with the corporate existence of the municipality through whose streets the rails and tracks were to be laid. *Detroit Citizens' St. Ry. vs. Detroit Railway*, 171 U. S., 48, 54; *St. Clair County Turnpike Co. vs. Illinois*, 96 U. S., 63; *Blair vs. Chicago*, 201 U. S., 400; 3 Dill. Mun. Corp., secs. 1265-1269.

"None of these decisions are applicable to a case like the present, where the Ohio Valley Telephone Company, with a perpetual charter, has received, not from the municipality, but from the State of Kentucky, the grant of an assignable right to use the streets of a city which remains the same legal entity, although by a later statute it has been put in the first class and given greater municipal powers. *Vilas vs. Manilla*, 220 U. S., 345, 361.

"In considering the duration of such a franchise it is necessary to consider that a telephone system cannot be operated without the use of poles, conduits, wires and fixtures. These structures are permanent in their nature and require a large investment for their erection and construction. To say that the right to maintain these appliances was only a license, which could be revoked at will, would operate to nullify the charter itself, and thus defeat the State's purpose to secure a telephone system for public use. For manifestly, no one would have been willing to incur the heavy expense of installing these necessary and costly fixtures if they were removable at the will of the city and the utility and value of the entire plant be thereby destroyed. Such a construction of the charter cannot be supported, either from a practical or technical standpoint.

"This grant was not at will, nor for years, nor for the life of the city. Neither was it made terminable upon the happening of a future event, but it was a necessary and integral part of the other franchises conferred upon the company, all of which were perpetual and none of which could be exercised without this essential right to use the streets."

#### IV.

This franchise, being a vested property right, can be assigned, mortgaged or leased as other property.

At the time the Oregon Central Railroad Company was incorporated, and at the time it dissolved, and on October 6, 1880, at the time it sold and transferred its property and this franchise to the Oregon & California Railroad Com-

pany, sections 6699 and 6701 of Lord's Oregon Laws were then in force, which are as follows:

*"SEC. 6699. All corporations that \* \* \* are dissolved by virtue of the provisions of section 6701, \* \* \* continue to exist as bodies corporate for a period of five years thereafter, if necessary, for the purpose of prosecuting or defending actions, suits or proceedings by or against them, settling their business, disposing of their property," etc.*

*"SEC. 6701. Any corporation organized under the provisions of this chapter may at any meeting of the stockholders which is called for such purpose, by vote of the majority of the stock of any such corporation, \* \* \* authorize the dissolution of such corporation, and the settling of its business and disposing of its property and dividing its capital stock in any manner it may see proper."*

At the time the Oregon & California Railroad Company leased its property and this franchise to the Southern Pacific Company, section 6687, Lord's Oregon Laws, was in force, and is as follows:

*"SEC. 6687. Upon making and filing the articles of incorporation as herein provided the persons subscribing the same are incorporators, and authorized to carry into effect the objects specified in the articles, in the manner provided in this chapter; and they and their successors, associates and assigns by the name assumed in said articles, shall thereafter be deemed a body corporate, with power,—*

*"7. In case the object or purpose for which any such corporation is incorporated is in whole or in part to construct, or construct and operate a railroad, to lease any part or all its road to any other company incorporated for the purpose of maintaining and operating a railroad, and to lease or purchase, maintain and operate any part or all of any other railroad constructed by any other company upon such terms and conditions as may be agreed upon between said companies respectively."*

The object and purpose for which the Oregon & California Railroad Company was incorporated, as shown by its original and supplementary articles, was in part to construct and operate a railroad and to lease any part or all of its road to any other company incorporated for the purpose of maintaining and operating a railroad and to lease or purchase or maintain and operate any part of any other railroad constructed by any other company, and the Southern Pacific Company was authorized by its charter to enter into contracts with any corporation, company, or association in respect of the construction, establishment, acquisition, owning, equipment, leasing, maintenance, or operation of any railroads or telegraphs or steamship lines or any appurtenances thereof in any State or Territory of the United States. Manifestly, therefore, the Oregon Central Railroad Company was authorized to sell this franchise to the Oregon & California Railroad Company, and the Oregon & California was authorized to lease the same to the Southern Pacific Company and the Southern Pacific Company was authorized to accept a lease thereof.

The case of Oregon Railway & Navigation Company *vs.* Oregonian Railway Company, Ltd., 130 U. S., 1, relied upon by appellee in support of its contention that this franchise cannot be assigned or leased, is not in point for the reason that at the time the contract for the lease in that case was made there was no statute then in force in the State of Oregon authorizing the leasing of one railroad company to another of its entire property and franchises. The act of the legislature of the State of Oregon authorizing the leasing of such property by one railroad company to another was passed on February 17, 1887, and prior to the time the Oregon & California Railroad Company leased this property and this franchise to the Southern Pacific Company. There was ample statutory authority, therefore, for this lease. Aside from the authority expressly granted by the laws of the State of Oregon to a railroad corporation to sell



and dispose of its property and franchises and to lease the same, the City of Portland has ratified the assignment of this franchise and the lease thereof to the Southern Pacific Company, and it is estopped from claiming that such franchise was not assignable or could not be leased or that the Southern Pacific Company has no rights thereunder; it has from time to time since ordinance No. 599 was passed passed other ordinances expressly recognizing the rights of the Oregon & California Railroad Company as purchaser and those of the Southern Pacific Company as lessee of said franchise. It has passed ordinances requiring the Southern Pacific Company and its predecessors in interest to improve Fourth street, and has levied and collected from the Oregon and California Railroad Company taxes on said franchises amounting to large sums of money.

## V.

Ordinance No. 16491 is not within any power reserved to the city by ordinance No. 599, nor is it a reasonable or necessary exercise of any police power of the State or city regulating the use of the railroad on Fourth street, with a view to the public welfare. It is unreasonable and oppressive.

The case of *Railroad Co. vs. Richmond*, 96 U. S., 521, is cited by appellee and relied upon as sustaining its position that the City of Portland, in the exercise of the powers reserved in ordinance No. 599, as well as in the exercise of its police power, had the right to prohibit the running or operation of steam locomotives or freight cars over Fourth street. The facts in that case are materially different and easily distinguishable from the facts in the case at bar. The facts in that case are stated in the opinion of the Court of Appeals of Virginia (67 Va., 83), and are as follows:

The Richmond, Fredericksburg & Potomac Railroad Company was incorporated February 25, 1834, by an act of the legislature of the State of Virginia—

"for the purpose of making a railroad from some point within the corporation of Richmond, to be approved by the common council, to some point within the corporation of Fredericksburg" (Charter, sec. 1),

And was authorized—

"to place on the railroad structure \* \* \* all machines, wagons, vehicles, carriages and teams of every description whatsoever \* \* \* necessary and proper for the purpose of transportation" (Charter, sec. 24).

On the 22d day of December, 1834, at a meeting of the president and directors of the Richmond, Fredericksburg & Potomac Railroad Company, the following preamble and resolutions were adopted:

"Whereas, by the act incorporating this company it is requisite that the point at which the railroad terminates, within the corporation of Richmond, should be approved by the common council, and it appears to the board most expedient to conduct the same from the Richmond turnpike along H street (now Broad street) to a point at or near the intersection of the said street and 8th street and for the present to terminate the same by suitable connections with the contemplated warehouses and workshops of the company on lots Nos. 477, 478, purchased by them from John Heth: Therefore,

"Be it resolved, That the approbation of the city council be requested to the above plan.

"Resolved, That the president cause a copy of the foregoing resolutions to be transmitted to the city council," etc.

In response to this resolution of the president and directors of the Richmond, Fredericksburg & Potomac Railroad Company, the city council of Richmond, on the 23d day of December, 1834, adopted the following preamble and resolutions:

"Whereas, by a resolution of the president and directors of the Richmond, Fredericksburg & Potomac Railroad Company submitted to the common council, it appears that it is deemed most expedient by the president and directors to conduct the said railroad from the Richmond turnpike along H street to a point at or near the intersection of said street and 8th street, and *for the present*, to terminate the same by suitable connections with the contemplated warehouses and workshops of the company on lots Nos. 477 and 478, purchased by them from John Heth:

*"Resolved*, That the common council do approve the proposed location of the said railroad and the *present* termination of the same, as prescribed in the foregoing resolution, and authorize the prosecution of the said work within the limits of the city on the above location: *Provided*, That in locating the said railroad no injury shall be done to the water-pipes now laid in and along said street; *Provided*, That the corporation of Richmond *shall not be considered as hereby parting with any power or chartered privilege not necessary to the railroad company for constructing the said railroad, and connecting the same with the depot of said company within the limits of the city.*"

On the 24th day of May, 1870, the legislature of the State of Virginia, by an act providing a charter for the city of Richmond, vested in the council of said city the power—

"to prevent the cumbering of streets, avenues, walks, public squares, lanes, alleys or bridges in any manner whatsoever;"

and the power—

"to determine and designate the route and grade of any railroad to be laid in said city and to restrain and regulate the rate of speed of locomotives, engines, and cars upon the railroad within said city, and \* \* \* *exclude the said engines and cars, if they pleased, provided no contract be thereby violated.*"

On the 8th day of September, 1873, after the main line of the railroad had been changed to another route and negotiations for the sale of the depot property by the company to the city had failed, the city council passed an ordinance entitled, "An ordinance to amend the third section of an ordinance to regulate the use of Broad street by the Richmond, Fredericksburg & Potomac Railroad Company," which said ordinance was as follows:

"Be it ordained by the council of the city of Richmond that section 3 of an ordinance passed May 13, —, entitled, 'An ordinance regulating the use of Broad street by the Richmond, Fredericksburg & Potomac Railroad Company, be amended and re-ordained so as to read as follows:

"SEC. 3. That on and after the 1st day of January, 1874, no car, engine, carriage or other vehicle of any kind belonging to or used by the Richmond, Fredericksburg & Potomac Railroad Company, shall be drawn or propelled *by steam* upon that part of their railroad or railway track on Broad street east of Belvidere street in said city. The penalty for failing to comply with this section shall be a fine of not less than \$100 nor more than \$500 for each and every offense, to be recovered before the police justice of the city of Richmond."

The railroad company admitted that it violated this ordinance, but contended that the ordinance was invalid because it was in violation of its charter rights.

The Richmond, Fredericksburg & Potomac Railroad Company claimed that the provisions of sections 1 and 24 of its charter above quoted, and the subsequent resolutions passed by it, soliciting approval of the city council of Richmond of the point at which its railroad should terminate within the corporation of Richmond, and the resolutions of the council above quoted, created a perpetual contract between the State and the said company, by which, for all time and under all circumstances, it could run its cars propelled by steam on Broad street, in the city of Richmond.

It will be observed that the legislature of the State of Virginia, under the act incorporating the Richmond, Fredericksburg & Potomac Railroad Company, in express language reserved to the city of Richmond *the power to approve the point at which the railroad should terminate within the corporation of Richmond*. It will also be observed that the city council of Richmond, pursuant to this power granted it by the legislature, after approving the point at which the railroad should terminate within the city of Richmond, added the following proviso to said resolution:

*"Provided further, That the corporation of Richmond shall not be considered as hereby parting with any power or chartered privilege not necessary to the railroad company for constructing the said railroad, and connecting the same with the depot of said company within the limits of the city."*

The railroad company adopted the corner of 8th and Broad streets as the terminal point of its road within the city of Richmond, being the point approved by the city council, with the express reservation,

*"That the corporation of Richmond shall not be considered as parting with any power or chartered privilege not necessary to the railroad company for constructing the said road."*

In the case of *Railroad Co. vs. Richmond*, 96 U. S., 521, the grant of the State to the railroad company to build its road "from some point within the corporation of Richmond" was conditional; it was subject to the approval of the common council of Richmond, and in the resolution of the common council it was expressly provided that the corporation of Richmond should not be considered as—

*"parting with any power or chartered privilege not necessary to the railroad company for constructing the said railroad and connecting the same with the depot of said company within the limits of the city."*

Thereby the city of Richmond reserved the right to exercise legislative and governmental powers over the road of the railroad company when constructed.

Here, the act of the legislature of the State of Oregon of October 14, 1862, did not reserve to the City of Portland any governmental or legislative powers over the road of the Oregon Central Railroad Company when constructed on Fourth street, but the legislature reserved to the City of Portland *power only in the first instance to designate the particular street over which said road should be constructed.*

The common council of the City of Portland, in the adoption of ordinance No. 599, was not exercising governmental or legislative powers, but instead it was exercising the only powers it had, viz., its business or proprietary powers. The purpose of the ordinance was not to govern the inhabitants of the city of Portland, but to obtain a private benefit for the city and for the inhabitants thereof.

It is claimed by the appellee, and the lower court held, that section 3 of ordinance No. 599, which is as follows:

*"Sec. 3. The common council reserve the right to make or alter regulations at any time they deem proper for the conduct of the said road within the limits of the city, and the speed of railroad cars and locomotives within said limits, and may restrict or prohibit the running of locomotives at such time and in such manner as they may deem necessary,"*

reserves to the city the power to prohibit the running and operation of steam locomotives or freight cars over, upon or along Fourth street.

Answering this contention, it is submitted that at the time ordinance No. 599 was passed the City of Portland had no power to grant a franchise to a railroad company to use its streets, nor to defeat in any manner a grant made by the State for such purpose. The only power the city had at that time, in relation to the use of the streets by a railroad, was a police power; if this be true, the only power the city could reserve in ordinance No. 599 was a power to adopt



such regulations as were not inconsistent with the grant of this franchise made by the State. The city had no power to attach conditions to the grant which would operate to defeat it.

We submit that a careful analysis of section 3 of ordinance No. 599 does not warrant the interpretation given it by the lower court or by the appellee. It provides that "the common council \* \* \* may restrict or prohibit the *running* of locomotives *at such time and in such manner as they may deem necessary.*"

It is contended by the appellee, and was held by the lower court, that this clause of section 3 means that the common council might, at any time they deemed necessary, prohibit absolutely the running of steam locomotives over Fourth street. In other words, it is contended that the clause "*at such time and in such manner*" has the same import and meaning as the words "*at any time*" or "*at all times*" or "*absolutely.*" It is submitted that if the city council had intended to reserve the power to prohibit the running of steam locomotives "*at any time*" or "*at all times*" or "*absolutely,*" it would have used these words instead of the words "*at such time and in such manner.*"

There is certainly no reserved power at all in this ordinance No. 599 to prohibit the running or operation of freight cars over Fourth street. There is no express reservation to this effect, and no language is used from which such reservation can be implied. Besides, if it be held that the council reserved the power to prohibit the running of freight cars at any time they should deem necessary, this would be equivalent to holding that the council might do indirectly what they are not empowered to do directly, viz., to defeat the grant of the legislature. When the legislature of Oregon passed the act entitled "An act providing for private incorporations and the appropriation of private property therefor," on the 14th day of October, 1862, under which act this franchise was granted to the Oregon Central

Railroad Company, the legislature certainly had in mind that the purposes of the grant of the right of a railway company to appropriate a street in a city or town to locate and operate its railroad, contemplated something more than a mere right to lay its tracks on said street. A grant with such limited right would be senseless and without any benefit whatever to the grantee. The evident purpose of this act of the legislature was to grant to railroad corporations power not only to lay their tracks upon the streets of the city, but to operate by the motive power then in use passenger and freight cars thereon, as public-service corporations. The grant of the right to appropriate the street for the purpose of constructing a railway thereon, necessarily carried with it as a part of the grant the right to operate and run both passenger and freight cars thereon.

In the very nature of things, therefore, it could not have been the intention of the legislature, in passing this act, to clothe a town or city, or the local authorities thereof, with power, either directly or indirectly, to defeat the manifest spirit and intent of this grant. As before stated, the only power the city could have was a police power to regulate the use of the street by the railroad company in such manner as would not defeat the purposes of the grant.

Our contention is that the language "common council \* \* \* may restrict or prohibit the running of locomotives at such time and in such manner as they may deem necessary," means nothing more than that the common council might by ordinance prohibit the running of locomotives on said street at or between certain hours of the day or night, or that they might prohibit the running of locomotives without the ringing of a bell at cross streets, or without spark arresters, or under similar regulations tending to preserve the safety of the public.

It is also submitted that, for like reasons, the city did not, under its police power, have the right to prohibit the running or operation of steam locomotives or freight cars on Fourth street.

It is contended by appellee that the grant of the legislature to the Oregon Central Railroad Company to appropriate and use Fourth street for the purpose of constructing and operating a railroad thereon, is not a franchise, but a mere license, revocable at any time; that is to say, that the city had the power, immediately after the railroad had appropriated the street and had completed its railroad thereon at a large expenditure of money, to revoke its right to use this street to operate its railroad, either directly or indirectly under the guise of the exercise of police power, by prohibiting the railroad from using steam locomotives or running freight cars over the street. Such contention is wholly at variance with the decisions, as well as with the spirit and intent of the act of the legislature conferring upon a railroad company the right to appropriate a street for railroad purposes. In the year 1862, at the time when the act of the legislature conferring this franchise was passed, the motive power then generally used for operating and running railway cars, both passenger and freight, was steam. Manifestly, the legislature, at the time of the passage of this act giving railway companies the right to appropriate such portion of a public street of a city or town as might be necessary to construct and operate its road, contemplated that such road, when constructed, should be operated by the motive power then generally used, and that the railroad would run both freight and passenger cars thereon.

It is contended that inasmuch as neither the act of the legislature nor ordinance No. 599 authorizes in express terms the use of steam locomotives as a motive power for operating a railroad, therefore the city has the power to prohibit the operation and running of steam locomotives on Fourth street and to compel the operation thereof by electricity.

Answering this contention, it is sufficient to say that at the time this act of the legislature was passed, as well as at the time ordinance No. 599 was adopted, electricity was not

used as a motive power at all in operating railroads, and certainly it cannot be contended with any degree of seriousness that at that remote time the legislature of the State of Oregon contemplated that both street and commercial railways should be operated by electricity. The Chicago Electric Railway, which opened at the Chicago Railway Exposition in 1883, was the first constructed in this country for business purposes.

It may readily be conceded that the city, under its police power, had the right by ordinance to regulate the time and the manner in which freight cars should be run over Fourth street—that is to say, it might provide that freight cars should be moved only during the night time, or during certain hours of the day or night; all this with a view to public safety. But when the contention is broadly made that the city, at any time after the completion of the road on Fourth street, and after its completion and operation to St. Joe on the Yamhill River, might arbitrarily prohibit the running of freight cars on Fourth street, it not only runs counter to the spirit and intent of the act of the legislature under this grant, but is directly in conflict with the act of Congress of May 4, 1870. The title of this act is, "An act granting lands to aid in the construction of a railroad and telegraph line from Portland to Astoria and McMinnville, in the State of Oregon," section 1 of which provides:

"That for the purpose of aiding in the construction of a railroad and telegraph line from Portland to Astoria, and from a suitable point of junction near Forest Grove to the Yamhill River near McMinnville, in the State of Oregon, there is hereby granted to the Oregon Central Railroad Company, now engaged in constructing the said road, and to their successors and assigns, the right of way through the public lands, of the width of 100 feet on each side of said road," etc.

This act of Congress, which evidently contemplated that this railroad when constructed would move intrastate and

interstate commerce by the operation of freight cars on said road, would be rendered absolutely nugatory if the City of Portland could, at any time after the completion of its road on Fourth street, prohibit the running of freight cars thereon. It will be remembered that the northern terminus of this road, as shown by the evidence, was at or near the northern boundary of the City of Portland, where the terminal grounds now are. The termini of this road was so designated pursuant to the provisions of section 4, subdivision 6, of the act of the legislature providing for private incorporations and the appropriation of private property therefor, which provides that if the corporation is formed for the purpose of the construction of any railroad, the articles of incorporation shall specify the termini of such road. The railroad company, having designated the termini of its road as the terminal grounds at the northerly boundary of the City of Portland, and at some point in the southerly part of the State, and Congress having passed this act to aid in the construction of said road between said termini, and having granted certain sections of the public lands in consideration of the operation of said road as a public service corporation between said termini, it is submitted that the railroad company was compelled to operate its road between these points and to move intrastate and interstate commerce over the same, or else to forfeit its rights under said act of Congress.

If the appropriation and use of Fourth street by the railroad company for the purpose of constructing and operating its road thereon was a mere license, revocable at any time, then the city had authority to revoke this right immediately after the road was completed from the terminal grounds in the northern end of Portland to St. Joe on the Yamhill River, the place designated under said act of Congress, and thereby defeat the purposes of the grant on the part of the State, as well as the grant made by Congress in aid of the construction of this railroad. As before stated, at that time the city did not have the power to grant this right—whether it be called a franchise or a license—but the

grant (whatever it may be termed) flowed directly from the State. Neither did the city have the power to attach any conditions that would operate to defeat this grant, or to adopt any regulations, under the guise of the exercise of police power, that would have the same effect.

Our contention is that ordinance 16491 impairs the obligation of the contract under which the street was appropriated by the railroad company and under which it located and operated its road, and that it deprives appellant of its franchise and property without due process of law, in that its enforcement empowers the city arbitrarily to take appellant's property without just, or any, compensation, and without its consent, in violation of section 18 of article I of the constitution of the State of Oregon, which provides that private property shall not be taken for public use without just compensation." It is conceded that compensation is not a condition to the adoption of regulations under the police power to protect the lives and secure the safety of the people, but such regulations must be reasonable. When they amount to a denial of the equal protection of the laws or operate to deprive a corporation of property without due process of law, they are unconstitutional and void.

And said ordinance deprives the appellant of its property without due process of law, in that it deprives it of the beneficial use of its franchises by means of the imposition of fines, imprisonment and forfeitures, and undertakes to enforce against appellant by such means a compliance with the contract between the State and the appellant, as attempted to be modified, and as construed by the city, and in that the city council, by said ordinance, have undertaken arbitrarily and conclusively to determine private rights, by the enactment of an ordinance purporting to decide and adjudicate questions of a judicial nature affecting private contract and property rights without a regular course of legal proceedings, or before a competent tribunal, and without the observance of any of those rules which our system of jurisprudence prescribes for the security of private rights.



Our contention is that this franchise, when it was accepted and acted upon by the railroad company, became a contract between the State and the railroad company; that if any power was reserved to modify this contract, it was a power reserved in the State and not in the city; that if the contract has been violated by the appellant and its predecessors, by either failing to conform to some condition which the State or city had power to impose, or by failing to observe some reasonable or necessary regulation, the State only, or the city upon the relation of the State, can enforce a compliance with said contract, or declare a forfeiture thereof, and this only in a tribunal having jurisdiction to determine contract and property rights; that in the enforcement of this contract, if violated, the city should be required to exercise its proprietary or contractual rights, and should not be permitted to exercise its legislative or governmental powers.

The ordinance complained of not only provides that the city may arbitrarily enforce a compliance with the terms of the contract as modified and interpreted by the city, but it prescribes penalties different and in excess of those authorized by the charter for the enforcement of its ordinances.

Section 73 of article IV of the charter of the City of Portland, approved January 23, 1903, which was in force at the time of the passage of ordinance No. 16491, provides that—

“The common council has power and authority, subject to the provisions, limitations and restrictions in this charter contained—

“To provide for punishment for a violation of any ordinance by fine or imprisonment, *not exceeding* \$500 fine or six months’ imprisonment, or both, or by forfeiture and penalty.”

Whereas ordinance No. 16491 makes the following provision for the punishment of a violation thereof:

“Sec. 2. Any violation of the provisions of this ordinance by the owners, officers, agents or employees, of said Oregon Central Railroad Company, its suc-

cessors, assigns or lessees, or any other person, firm or corporation, by so running or operating steam locomotives or freight cars (other than those excepted by section 1 thereof), or attempting to run or operate the same on said Fourth street after the time mentioned in section 1 of this ordinance, shall be punishable by a fine of not less than \$250 nor more than \$500 or by imprisonment for not more than six months, or by both such fine and imprisonment, and each day's running or operating, or attempting to run or operate such locomotive or freight cars, shall constitute a separate offense, and such violation shall be deemed a forfeiture of any and all rights and privileges claimed by said Oregon Central Railroad Company with respect to the operation of any railway on said street."

It will be observed that the charter provides for a punishment for a violation of any ordinance by a fine not exceeding \$500; whereas this ordinance imposes a penalty for a violation thereof by a fine of not less than \$250 nor more than \$500, and in addition to this penalty it imposes the further penalty of a forfeiture of all the rights and privileges claimed by the Oregon Central Railroad Company, its successors, assigns or lessees. It cannot be claimed that this ordinance is void only as to the fine sought to be imposed and valid as to the other punishment, because if the fine is eliminated, then the ordinance necessarily imposes a greater penalty than allowed by the charter, for the reason that the municipal court would have no alternative except to impose a fine and declare the forfeiture, if it had power to declare a forfeiture, which is denied.

This ordinance not only arbitrarily deprives appellant of the beneficial use of this franchise under the contract with the State, without any regular course of judicial procedure to settle its contract rights, but it goes further and seeks, by the imposition of penalties wholly unauthorized by the charter, to harass and annoy the appellant in the

use of its property, and this, too, under the guise of exercise of police power.

In conclusion, it is submitted that for all the reasons stated this ordinance is invalid, and that the decision of the lower court should be reversed.

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**IN THE**  
**Supreme Court**  
**OF THE**  
**UNITED STATES**

**October Term, 1911**

**No. 212**

---

**SOUTHERN PACIFIC COMPANY**

**Appellant**

**VS.**

**THE CITY OF PORTLAND**

**Respondent**

---

**BRIEF FOR DEFENDANT IN ERROR**

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**STATEMENT OF FACTS**

In January, 1869, the City of Portland, by ordinance No. 599, authorized and permitted the Oregon Central Railroad Company to lay a railway track and run its cars over the same, along the center of Fourth Street, from the southerly boundary line of the City of Portland to the north side of "G" Street (now Glisan Street) in said City. Section 3 of said ordinance, provided that

the Common Council reserved the right to make, or alter regulations at any time it might deem proper for the conduct of the said road, within the limits of the City, and might restrict, or prohibit the running of locomotives, at such time, and in such manner, as it might deem necessary. In Section 5 of said ordinance it was expressly provided that any refusal, or neglect of the said Oregon Central Railroad Company to comply with the requirements of said ordinance, or any other ordinance, enacted in pursuance thereof, should be deemed a forfeiture of the rights and privileges therein granted, and that it would be lawful for the Council to declare by ordinance the forfeiture of the same, and to cause the rails to be removed from the street. The Oregon Central Railroad Company accepted said ordinance, and the plaintiff in error is the successor in interest of said company.

On the first day of May, 1907, the City of Portland enacted Ordinance No. 16491 which prohibited the said Oregon Central Railroad Company, or its successor, the plaintiff in error, from operating steam locomotives, or freight cars on said Fourth Street, from and after 18 months from the final passage or approval of said ordinance. At the expiration of said period, the plaintiff in error continued to use steam locomotives on Fourth Street, and the general manager of the plaintiff in error was arrested for a violation of said ordinance. A suit was then begun in the Circuit Court of the United States for the District of Oregon, to enjoin the City of Portland from enforcing said ordinance, and in the due course of time said case was heard and determined by that court. It is contended by the plaintiff in error that

ordinance No. 16491 is void because it impairs the obligation of a contract (the franchise under which the road was located), and interferes with vested rights of property; that it deprives the plaintiff in error of its property without due process of law; that it deprives it of the equal protection of the laws, and that it is an unlawful interference with interstate commerce.

It is contended on behalf of the defendant in error that at the time of the enactment of Ordinance No. 599, the general laws of the State of Oregon (Secs. 6841 and 6842 L. O. L.) provided that whenever it should be necessary and convenient in the location of any railroad to appropriate any part of any public road, street or alley, or public grounds, the corporation constructing the road, if within the corporate limits of the municipality, was authorized to agree upon the extent, terms and provisions upon which the same might be appropriated or used, and that this section gave the city of Portland power to designate the street upon which the predecessor in interest of the plaintiff in error to locate its road. This carried with it the power to impose reasonable conditions to such grant or permission, which, when accepted by the grantee, became binding upon it, and that said ordinance No. 599 specifically reserved unto the city the right to regulate the use of the street for railway purposes, and, if necessary, to exclude therefrom steam locomotives and freight cars whenever in the judgment of the council such legislation was necessary or advisable.

It is further contended by the defendant in error that Ordinance No. 16491 does not attempt to destroy or im-

pair any vested rights. Defendant's only purpose is to regulate the use of the street. It is further contended that the enactment of Ordinance No. 599, irrespective of the reserved power in the ordinance, did not deprive the city of its police powers nor of the right to exercise this power; that the authority reserved is broad and general in its terms and is not susceptible of any technical construction; that it was intended merely to reserve the power to regulate or even prohibit the use of steam locomotives. The plain intent was to reserve the right to make all needful rules and regulations governing the operation of the railroad as the growth of the city and changing conditions might justify, even to the extent of prohibiting the use of steam locomotives or freight cars whenever in the judgment of the council this should become necessary.

It is further contended by the defendant in error that the rapid growth of this western city has necessitated such legislation. It was also contended in the lower court by the defendant in error that Ordinance No. 599 is not a franchise for the reason that at the time of the enactment thereof the city had no authority to grant franchises as that term is now understood; that said ordinance is merely a license or permission on the part of the council to the grantee named therein to use the street, revocable at any time, and therefore the Oregon and California Railroad Company, the predecessor in interest of the plaintiff in error, not having any franchise on the street, the enactment of Ordinance No. 16491 did not impair or destroy any contract rights within the meaning of the Federal Constitution. And it was further contended that the grant was personal to the grantee



and that it had no power or authority to transfer the license or permission to the Southern Pacific Company, the plaintiff in error, without the consent of the City, and therefore so far as the plaintiff in error is concerned, it having no vested right on the street, the enactment of Ordinance No. 16491 did not impair or destroy any rights.

The lower court entered a decree adjudging said Ordinance No. 16491 to be a valid exercise of the city's power under the provisions of Ordinance No. 599, and also declared that its provisions were not unreasonable or arbitrary, since it was within the legitimate police power of the municipality, and ordered that the bill of complaint be dismissed. However, the Court entered an order restraining the defendant in error from enforcing said decree until this suit could be finally determined by this Honorable Court.

### POINTS AND AUTHORITIES

1. The ordinance, authorizing the plaintiff in error to use Fourth Street and reserving to the city the right to make and alter regulations governing the conduct of the road within the limits of the city, to regulate the speed of cars and locomotives within such limits and to restrict the running of locomotives at such time and in such manner as might be deemed necessary, reserves to the city the right to make such rules and regulations, even to the extent of prohibiting the use of steam locomotives or freight cars on Fourth Street.

Railroad Co. v. Richmond, 96 U. S. 521;

Buffalo & Niagara Falls Ry. Co. v. City of Buffalo, 5 Hill (N. Y.) 209;

McQuillan on Ordinances (2d Ed.) Sec. 763;  
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 Dillon on Municipal Corporations (5th Ed.)  
 Vol. III, §1229, p. 1952; and cases cited un-  
 der note to text;  
 Clinton v. Worcester, 199 Mass. 279;  
 Rutherford v. Hudson R. T. Co., 73 N. J. L. 227;  
 McQuaid v. Portland Ry. Co., 18 Ore. 248;  
 Article II, §4, Const. Ore.

2. The power reserved in Ordinance No. 599 to regulate the operation of locomotives on Fourth Street, if involved or doubtful, should be construed in favor of the city against the grantee.

O. R. N. Co. v. Oregonian Ry., 130 U. S. 1, 9  
 Sup. Ct. 409, 32 L. Ed. 837;

Freeport Water Co. v. Freeport City, 180 U.  
 S. 587, 21 Sup. Ct. 493, 45 L. Ed. 679;

Burns v. Multnomah Ry. Co. (C. C.) 15 Fed.  
 177.

3. Ordinance No. 599 was necessarily made and accepted subject to the city's right to the exercise of its police power. The power to make such regulations concerning the operation of the plaintiff's road as public safety and welfare might, from time to time, require, as that power cannot be contracted away.

- N. P. v. Duluth, 208 U. S. 583;  
 Joyce on Franchises, Sec. 138;  
 Ex parte Koehler, 23 Fed. 529;  
 P. Ry. L. & P. Co. v. Railroad Commission, 105  
 Pac. (Ore.) 713;  
 Constitution Ore. Article II, §2;  
 Charter City of Portland, Abstract of Record,  
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 Fertilizing Co. v. Hyde Park, 97 U. S. 663.  
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 Elliott on Roads and Streets (3d Ed.) Vol. II,  
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 Hennington v. Georgia, 163 U. S. 299;  
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 N. Y. & N. E. R. R. v. Bristol, 151 U. S. 567,  
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 New Orleans Gas Co. v. Louisiana Light Co.,  
 115 U. S. 60.  
 Budd v. New York, 143 U. S. 517;  
 Chicago, Burlington & Quincy Railroad v. Chi-  
 cago, 166 U. S. 226;

- Detroit Railroad Co. v. Osborne, 189 U. S. 383;  
 New Orleans Gas Light Co. v. Drainage Commissioners of New Orleans, 197 U. S. 453;  
 Chicago, Burlington & Quincy Railroad Co. v. People of the State of Illinois, ex rel Drainage Commissioners, 200 U. S. 561;  
 Union Bridge Co. v. United States, 204 U. S. 364;  
 Cooley on Const. Lim. (7th Ed.) p. 400;  
 9 Enc. of U. S. Sup. Ct. Reports, 494;  
 Stone v. Miss., 101 U. S. 814, 817;  
 Butcher's Union v. Crescent City Co., III. U. S. 748;  
 Slaughter House Cases, 16 Wall. 36, 62;  
 Boyd v. Ala., 94 U. S. 645;  
 Douglas v. Kentucky, 168 U. S. 488;  
 Railway Co. v. People, 201 U. S. 506;  
 City of Portland v. Cook, 48 Ore. 550, 555;  
 Portland v. Meyer, 32 Ore. 368, 371;  
 State v. Muller, 48 Ore. 252, 255; (208 U. S. 412);  
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 St. Louis & San Francisco Ry. Co. v. Mathews, 165 U. S. 1;  
 Providence Bank v. Billings, 4 Pet. 514;  
 Railroad Comm. Cases, 116 U. S. 307, 325; 29 L. Ed. 636, 642; 6 Sup. Ct. Rep. 344, 388, 1191;  
 Vicksburg S. & P. R. Co. v. Dennis, 116 U. S. 665, 29 L. Ed. 770; 6 Sup. Ct. Rep. 625;  
 Freeport Water Co. v. Freeport, 180 U. S. 587,

588, 611; 45 L. Ed. 679, 693; 21 Sup. Ct. Rep. 493;

Stanislaus Co. v. San Joaquin & K. River Canal & Irrig. Co., 192 U. S. 201; 48 L. Ed. 306, 412; 24 Sup. Ct. Rep. 241;

New York ex rel Metropolitan Street R. Co. v. New York State Tax Commrs., 199 U. S. 1; 50 L. Ed. 65; 25 Sup. Ct. Rep. 705;

Water, Light & Gas Co. v. Hutchinson, 207 U. S. 385; 52 L. Ed. 257; 28 Sup. Ct. Rep. 135;

Home Tel. & Tel. Co. v. Los Angeles, 211 U. S. 273.

4. Ordinance No. 16491, prohibiting the use of steam locomotives on Fourth Street, does not deny the plaintiff in error the equal protection of the laws, although it alone is named in the ordinance, where no other person or corporation has the right to run engines in that street, as is the case at bar.

Richmond F. & P. R. Co. v. Richmond, 96 U. S. 521.

5. The appropriate regulation of the use of property is not "taking it," within the meaning of the constitutional prohibition against the deprivation of property without due process of law.

Richmond F. & P. R. Co. v. Richmond, 96 U. S. 521.

Pittsburg, C. & St. L. R. Co. v. Hood, 36 C. C. A. 428, 94 Fed. 624.

6. The ordinance complained of, prohibiting the use of steam locomotives on Fourth Street, does not impair

any vested rights of the plaintiff in error under its charter.

Richmond F. & P. R. Co. v. Richmond, 96 U. S. 521.

7. The charter of the City of Portland in force when Ordinance No. 16491 was passed contains the following provision: "The council has power and authority, subject to the provisions, limitations and restrictions in this charter contained: (1) To exercise within the limits of the City of Portland all the powers commonly known as the police power to the same extent as the State of Oregon has or could exercise said power within said limits." (Charter, City of Portland, Sec. 73; Laws of Oregon, 1903, p. 24.) Under this power the council has authority to regulate the running of railroad cars within the city limits and to prohibit their propulsion by steam.

Richmond F. & P. R. Co. v. Richmond, 96 U. S. 521;

Buffalo & N. F. R. Co. v. Buffalo, 5 Hill (N. Y.) 209;

Dillon on Municipal Corporations (5th Ed.), Sec. 65.

8. The rule is generally recognized that municipal corporations are prima facie the sole judges respecting the necessity and reasonableness of their ordinances.

McQuillin on Municipal Ordinances (2d Ed.), Sec. 731, p. 1586;

47 Alabama, Greensboro v. Ehrenreich, 80 Ala. 579; 60 Am. Rep. 130; Van Hook v. Selma, 70 Ala. 361; 45 Am. Rep. 85;



California: *Ex parte Delaney*, 43 Cal. 478; *Ex parte Smith*, 38 Cal. 702;  
 Kentucky: *Louisville v. Roupe*, 6 B. Mon. (Ky.) 591;  
 Maryland: *Spriggs v. Garrett Park*, 89 Md. 406;  
 Massachusetts: *Commonwealth v. Patch*, 97 Mass. 221;  
 Missouri: *Lamar v. Weidman*, 57 Mo. App. 507;  
       *Hanibal v. M. & K. Tel. Co.* 31 Mo. App. 23;  
 New Jersey: *Budd v. Camden*, 69 N. J. L. 193, 54 Atl. 569;  
 Union Oil Co. v. Portland, 198 Fed. 441;  
 Dobbins v. Los Angeles, 195 U. S. 223.

9. The legal presumption is in their favor, unless the contrary appears on their face or is established by proper evidence.

McQuillan on Municipal Ordinances (2 Ed.)  
 Sec. 731, p. 1587;  
 Union Oil Co. v. Portland, 198 Fed. 441.

10. In determining the question, the court will have to regard all the circumstances of the particular city or corporation, the object sought to be obtained, and the necessity which exists for the ordinance.

McQuillan on Municipal Ordinances (2 Ed.)  
 Sec. 732, p. 1588.

11. When a privilege or a franchise is granted containing the reserved power to alter, amend or repeal, whenever the public interest may require, no question

as to the impairment of the obligation of the contract can arise when additional burdens are imposed.

*N. P. v. Duluth*, 208 U. S. 583;

*Sioux City Street Ry. Co. v. Sioux City*, 138 U. S. 98;

*Nellis on Street Railways*, Vol. 1, §46.

12. A municipal corporation has no power to grant a franchise in perpetuity without express statutory authority from the legislature.

*City of Joseph v. Joseph Water Co.*, 57 Or. 586;  
*Boise City Artesian Water Co. v. Boise City*,  
123 Fed. 232;

*Boise City Artesian Water Co. v. Boise*, 186  
Fed. 4705;

*Logansport Railway Co. v. City*, 114 Fed. 688;  
*Citizens St. Ry. v. Detroit*, 171 U. S. 48;

*Nellis on Street Railways* §46.

*Elliott on Roads & Streets*, Vol. II, §1048, (and  
cases cited in note);

*Lake Rowland v. Baltimore*, <sup>77</sup>~~97~~ Md. 352;

*City of Bellville v. Citizens R. Co.*, 152 Ill. 171;

*McQuaid v. Portland Ry. Co.*, 18 Ore. 237;

*Cedar Rapids Water Co. v. Cedar Rapids*, 118  
Iowa 234;

28 Cyc. 655, 875;

*Cooley's Constitutional Limitations* (6th Ed.)  
251;

*Brenham v. Water Co.*, 67 Tex. 542;

*Ill. Trust & Savings Bank v. Arkansas City  
Water Co.* (C. C. 76 Fed. 196;

Birmingham & Pratt Mines St. Ry. Co. v. Birmingham, 79 Ala. 472 (58 Am. Rep. 615).

Huron Water Works Co. v. City of Huron, (S. D.) 12 Am. R. R. & Corp. Rep. 398.

Westminster Water Co. v. Westminster (Md.), 64 L. R. A. 630, 98 Md. 551.

A contract beyond the power of the city is void ab initio.

State v. Minnesota Ry. Co., 80 Minn. 108, 50 L. R. A. 656;

Flynn v. Little Falls Elec. Co., 74 Minn. 180.

The city was vested with the right and power at the time Ordinance No. 599 was passed to designate the street upon which the railroad could locate its road, and this right carried with it the power to impose reasonable conditions to such grant or permission which, when accepted by the grantee became binding on it.

Pittsburg C. & St. L. Ry. Co. v. Hood, 94 Fed. 618;

Southern Bell Tel. & Tel. Co. v. City of Mobile, 162 Fed. 523;

Mercantile Trust & Deposit Co. v. Collins Park & B. R. Co., 101 Fed. 347;

Pacific Ry. Co. v. Leavenworth, Fed. Case No. 10649 (1 Dillon 393);

Michigan Tel. Co. v. City, 93 Fed. 11;

Pittsburg C. & St. L. Ry. Co. v. Hood, 94 Fed. 618.

13. Prohibition of steam power, under Ordinance No.

16491 does not prevent employment of electricity as a motive power.

Booth on St. Railways, §68 (2d Ed.).

14. Ordinance No. 16491 does not constitute an interference with interstate commerce.

Smith v. Ala., 121 U. S. 465.

15. The rule is generally recognized that municipal corporations are prima facie the sole judges respecting the necessity and reasonableness of their ordinances, subject to the supervision of the courts.

McQuillan on Ordinances (2d Ed.) Vol. II,  
§§731, 732;

Union Oil Co. v. Portland, 198 Fed. 441;

Holden v. Hardy, 169 U. S. 366;

Dobbins v. Los Angeles, 195 U. S. 223.

16. Evidence in case at bar found by court below to justify enactment of Ordinance No. 16491.

Opinion of Court, Abstract of Record, page 31.

17. Any doubt or ambiguity in Ordinances No. 599 and No. 16491 must be resolved against appellant.

19 Cyc. 1459;

O. R. & N. Co. v. Ore. Ry. Co., 130 U. S. 1, 26;

Mayor v. Farmers L. & T. Co., 143 Fed. 67, 71;

City v. Helena W. Wks., 122 Fed. 1, 14;

Oregon v. P. Gen. Elec. Co., 52 Ore. 343;

Joseph v. Joseph Water Co., 57 Ore. 586.

18. A right granted in the nature of a franchise, to be exercised for a public purpose, cannot be assigned or leased without legislative authority.

Oregon v. P. G. E. Co., 52 Ore. 521;

Oregon Ry. Co. v. Oregonian Ry. Co., 130 U. S. 1.

### **ARGUMENT.**

On May 1, 1907, the Council of the City of Portland enacted Ordinance No. 16491, which reads as follows:

“Section 1: It shall be unlawful for the Oregon Central Railroad Company of Portland, Oregon, its successors, assigns, or their lessees, or other person, firm or corporation, to run or operate steam locomotives or freight cars over, upon or along Fourth Street between Glisan Street and the southerly limits of the City of Portland, from and after eighteen months from the final passage or approval of this ordinance, excepting freight cars for the reconstruction, repair or maintenance of the railway lawfully and rightfully on said street.

“Section 2: Any violation of the provisions of this ordinance by the owners, officers, agents or employees of said Oregon Central Railroad Company, or its successors, assigns or lessees, or any other person, firm or corporation, by so running or operating steam locomotives or freight cars (other than those excepted in Section One hereof), or attempting to run or operate the same on said Fourth Street after the time mentioned in Section One of this ordinance, shall be punishable by a fine of not less than \$250.00 nor more than \$500.00, or by imprisonment for not more than six months, or by both

such fine and imprisonment, and each day's running or operating, or attempting to run or operate such steam locomotive or freight cars shall constitute a separate offense, and such violation shall be deemed a forfeiture of any and all rights and privileges claimed by said Oregon Central Railroad Company with respect to the operation of any railway on said street.

"Section 3: This ordinance shall not be construed so as to recognize, assent to, affirm, confirm, ratify or extend any right, franchise or privilege relative to the maintenance or operation of any railway or the use, operation or running of any railway car or cars, motor or motors, locomotive or locomotives or other railway vehicle or vehicles in, on, over, along or upon said Fourth Street heretofore, now or hereafter claimed, alleged or set up by any person, persons, firm or corporation."

On December 30, 1868, the Council of the City of Portland enacted Ordinance No. 599, which reads as follows:

"Section 1: The Oregon Central Railroad Company, of Portland, Oregon, is hereby authorized and permitted to lay a railway track and run cars over the same along the center of Fourth Street, from the south boundary line of the City of Portland to the north side of G Street, and as much farther north as said Fourth Street may extend or be extended, upon the terms and conditions as hereinafter provided.

"Section 2: The said railroad company shall grade to established grades, construct, and maintain in good repair said street, at least six (6) feet in width upon each side of the center line of said street, and as much wider as may be affected by



said railway or the construction thereof, and shall do and perform said work and the improvement and repair thereof in such manner and as often as the Common Council of the City of Portland may at any time provide for or require.

"Section 3: The Common Council reserve the right to make or to alter regulations at any time, as they deem proper, for the conduct of the said road within the limits of the city, and the speed of railway cars and locomotives within said limits, and may restrict or prohibit the running of locomotives at such time and in such manner as they may deem necessary.

"Section 4: All alterations of grades or streets required for laying said railroad track, and all improvements and repairs of the same for said purpose, shall be made at the expense of the said railway company, and the same shall be made as may be provided by ordinance.

"Section 5: It is hereby expressly provided that any refusal or neglect of the said Oregon Central Railroad Company to comply with the provisions and requirements of this ordinance, or any other ordinance passed in pursuance hereof, shall be deemed a forfeiture of the rights and privileges herein granted; and it shall be lawful for the Common Council to declare by ordinance the forfeiture of the same, and to cause the said rails to be removed from said street."

The general laws of Oregon in force at that time read as follows:

"Section 6841. When it shall be necessary or convenient in the location of any road herein mentioned to appropriate any part of any public road,

street, or alley, or public grounds, the county court of the county wherein such road; street, alley, or public grounds may be, unless the same be within the corporate limits of a municipal corporation, is authorized to agree with the corporation constructing the road, upon the extent, terms, and conditions upon which the same may be appropriated or used, and occupied by such corporation, and if such parties shall be unable to agree thereon, such corporation may appropriate so much thereof as may be necessary and convenient, in the location and construction of said road. (L. 1862; D. p. 666, §26; H. §3242; B. & C. §5077.)"

"Section 6842. Whenever a private corporation is authorized to appropriate any public highway or grounds as mentioned in the last section, if the same be within the limits of any town, whether incorporated or not, such corporation shall locate their road upon such particular road, street or alley, or public grounds within such town as the local authorities mentioned in the last section and having charge thereof shall designate; but if such local authorities shall fail or refuse to make such designation within a reasonable time when requested, such corporation may make such appropriation without reference thereto."

The Circuit Court, through Judge Robert S. Bean, was of the opinion that Ordinance No. 16491 was valid; that the Council has the authority under the reservation made in Section 3 of Ordinance No. 599 to enact it and whether the reservation was made, or not, or whether the plaintiff in error was occupying the street under a franchise, or mere permission, yet, the City had the right under the police power, to enact said ordinance.

The opinion of the lower Court is as follows:

"This is a suit to enjoin the City of Portland from enforcing Ordinance No. 16491, adopted in May, 1907, making it unlawful for the Oregon Central Railroad Company, 'its successors, assigns or their lessees, or any other person, firm or corporation, to run or operate steam locomotives or freight cars over, upon or along Fourth Street between Glisan Street and the southerly limits of the City of Portland, from and after 18 months from the final passage or approval of this Ordinance, excepting freight cars for the reconstruction, repair or maintenance of the railway lawfully and rightfully on said street.' The plaintiff is occupying and using the street in question for railway purposes, as the assignee, lessee or successor in interest of the Oregon Central Railroad Company which, by ordinance No. 599, approved January 6, 1869, was 'authorized and permitted to lay a railway track and run cars over the same along the center of Fourth Street, from the south boundary line of the City of Portland to the north side of "G" (now Glisan) Street, and as much farther north as said Fourth Street may extend or be extended upon the terms and conditions' as therein provided.

"By Section 3 of the Ordinance 'The Common Council reserve the right to make or alter regulations at any time as they deem proper for the conduct of the said road within the limits of the city, and the speed of railway cars and locomotives (within said limits) and may restrict or prohibit the running of locomotives at such time and in such manner as they may deem necessary.' The terms and conditions of the Ordinance were accepted by the grantee and it proceeded to construct its road along the street and such road has ever since been used and operated by it and its successors in inter-

est for railway purposes, and numerous freight and passenger trains propelled by steam locomotives now pass over the road daily.

“At the time of the passage of Ordinance No. 599, the City had no express authority given it to grant franchises for the construction or operation of railroads on its streets. Under the general law of the state, however, a railroad corporation was authorized, when necessary and convenient in the location of its road ‘to appropriate any part of any public road, street or alley or public grounds’ but if it desired to appropriate a street within the limits of an incorporated town or city, the company was required to locate its road upon such street as the local authorities might designate. (Sec. 5077-5078 B. & C. Comp.)

“The plaintiff contends that this legislation and the Ordinance of the city designating the street upon which its grantee should locate its road gave to the grantee and its successors or assigns a perpetual right or franchise to use the street for railway purposes, which cannot be revoked or impaired by subsequent legislation, and that Ordinance No. 16491 is void, so far as it prohibits the use of steam locomotives or freight cars on or along the street because first: it impairs the obligation of the contract under which the road was located, and interferes with vested rights of property. Second: it deprives the plaintiff of its property without due process of law. Third: it deprives it of the equal protection of the laws. And Fourth: it is an unlawful interference with Interstate Commerce.

“The position of the City on the other hand is first that at the time of the passage of Ordinance

No. 599 the city had no power or authority to grant franchises for the use of its streets for railway purposes. Second: that such ordinance was merely a license or permission on the part of the Council to the grantee named therein to use the street, revocable at any time. Third: that the grant was personal to the grantee, and it had no power or authority to assign or transfer the rights thereby granted without the consent of the city. And fourth: that by the terms of the ordinance the city reserved the right to regulate the use of the street for railway purposes to the exclusion of steam locomotives and freight cars therefrom whenever in the judgment of the Council such legislation was necessary or advisable.

"I do not deem it necessary to consider all of these questions at this time. In any view, the city was vested with the right and power at the time Ordinance No. 599 was passed to designate the street upon which the company should locate its road, and this carried with it the power to impose reasonable conditions to such grant or permission which, when accepted by the grantee, became binding upon it. *Pittsburg C. & St. Ry. vs. Hood*, 94 Fed. 618. *Southern Bell Tel. & Tel. Co. vs. City Mobile*, 162 Fed. 523.

"Whether the ordinance is considered a franchise, license or mere permission, it gave the consent of the city to the use of the street for railway purposes upon certain terms and conditions, and when accepted became in effect a contract between the city and the company. It may be conceded for the purpose of this case that the city could not subsequently revoke the permission thus given or impair or destroy the rights thereby conferred. No



attempt is made to do so by Ordinance No. 16491. Its only purpose is to regulate the use of the railroad. The passage of Ordinance No. 599 did not deprive the city of its police power. *N. P. vs. State of Minnesota*, 208 U. S. 583; *Beer Co. vs. Mass.*, 97 U. S. 25; *Mugler vs. Kansas*, 123 U. S. 623, nor of the right to exercise the power and authority expressly reserved and stipulated in the contract between it and the railroad company. The grant or permission was made or given by the city and accepted by the company upon the terms and conditions therein specified which, among other things, included the right of the city to make regulations for the conduct of the road at any time the Common Council might deem proper, to regulate the speed of the cars and locomotives and to restrict and prohibit the running of locomotives at such times and in such manner as the Council may deem necessary. The authority thus reserved is broad and general in its terms, and while a technical construction of some of the language may support the argument of the plaintiff that it was thereby intended to reserve the power to regulate and not prohibit the use of steam locomotives, I think the plain intention was to reserve the right to make such rules and regulations covering the operation of the road as might, from time to time, be necessary even to the extent of prohibiting the use of steam locomotives or freight cars whenever such legislation might be necessary for the safety or convenience of the public. If, however, the language of the ordinance is involved or doubtful, it should be construed against the grantee and in favor of the public for, as said by the Supreme Court in *O. R. N. vs. The Oregonian Ry.*, 130 U. S. 1, 'when a statute makes a grant of property, powers or franchises to a private corporation or to a



private individual, the construction of the grant in doubtful points should always be against the grantee, and in favor of the government.' See also to the same effect *Freeport Wtr. Co. vs. Freeport City*, 180 U. S. 587; *Burns vs. Multnomah Ry. Co.*, 15 Fed. 177.

"I conclude therefore that the legislation complained of is valid because within the powers reserved to the city by the ordinance under which the plaintiff is now occupying the street.

"But if I am mistaken in this view it is still, in my opinion, valid because within the general police power of the city. The grant, permission, license or authority, whatever it may be called, of plaintiff's grantor to occupy the street for railway purposes was necessarily made and accepted subject to the right of the city, under its police power, to make such regulations concerning the use thereof as the public safety and welfare might from time to time require. The legitimate exercise of legislative power in securing the public safety, health and morals is not within the inhibition of the Federal Constitution against the impairment of obligations of contracts, the deprivation of property without due process of law, or the equal protection of the laws, for as said by Mr. Chief Justice Fuller, 'The governmental power of self-protection cannot be contracted away, nor can the exercise of rights granted, nor the use of property, be withdrawn from the implied liability to governmental regulation in particulars essential to the preservation of the community from injury.' *N. Y. & N. E. R. R. vs. Bristol*, 151 U. S. 567. Every grant therefore of a public franchise or right is subject to the legitimate exercise of police power by the state or municipality and it has been decided that the power

to order and establish suitable police regulations authorizes municipal corporations to prohibit the use of steam locomotives in the public streets when such action does not interfere with vested rights. *R. R. Co. vs. Richmond*, 96 U. S. 521.

"There is no express stipulation in Ordinance No. 599 that the grantee should be permitted to use steam locomotives as a motive power for the propelling of trains over the road therein specified, or that it might use freight cars thereon. The right granted was simply to lay 'a railroad track and run cars over the same' and nothing is said about motive power or the character of the cars. The grantee therefore occupied the street subject to the general power the city in respect to the use of the road when constructed. The legislation complained of therefore does not impair any vested rights expressly given by the ordinance, and it is not for the court to determine in this case whether the power reserved to the city has been judicially exercised. It is clearly not void as an unreasonable or arbitrary exercise of such power. At the time the city granted to the plaintiff's predecessors in interest authority or permission to occupy Fourth Street for railway purposes, the street was an unimproved back street with scattering dwellings along it and no business houses. It is now practically in the heart of the business district and is one of the principal business streets of the city. It is frequented daily by a large number of persons, teams and vehicles constantly traveling along and across the street during business hours. It is quite steep throughout the business district, and the noise, vibration, smoke, cinders and soot from the moving steam locomotives and trains seriously interfere with the transaction of public and private

business, and it is a constant source of danger and inconvenience to the public.

"The court therefore cannot declare that the provisions of the ordinance sought to be enjoined are unreasonable or arbitrary, and since it is within the legitimate police power of the municipality, it must be upheld.

"It follows that the complaint must be dismissed and it is so ordered."

Grantee, under Ordinance No. 599, accepted it subject to the reserved power therein to exclude locomotives and freight cars from Fourth Street.

Mr. McQuillin, in his new work on Municipal Corporations (2 Ed.) Section 763, says:

"When privileges, franchises, etc., of the character under consideration, are granted, either by the state or municipal corporation, the practice generally prevails to reserve the power to alter, amend or repeal whenever the public interest may require, and this question is solely within the discretion of the legislative authorities. Such reservation may be in the State Constitution, legislative act, municipal charter or in the law or ordinance granting the franchise. Where the power to regulate the franchise and impose conditions is reserved no question as to the impairment of the obligation of the contract can arise if the legislative authorities choose to impose additional burdens upon the enjoyment of the franchise. The reserved power authorizes the making of any alteration or amendment which will not defeat or substantially impair the object of the grant or any rights vested under

it. 'The power of alteration and amendment is not without limitation, but must be in good faith and consistent with the specific object of the charter.'

"The reserved power to alter or amend will be construed favorably to the public. Thus, under a statute conferring power to regulate water rates which are required to be 'fixed by ordinance,' the power was construed as continuing and authorized changes in rates from time to time as might be deemed necessary and just, both to the company and the public."

Mr. Nellis, in his work on Street Railways, Section 46, Vol. I, says:

"Where a franchise is granted by an ordinance and accepted by the company, the acceptance of the privileges conferred thereby carries with it the acceptance of the burdens imposed. Obligations in the nature of a contract are created and the doctrine applies that one who takes the benefits secured to him by contract cannot refuse to comply with the obligations imposed upon him thereby. A company seeking a franchise may accept the one granted or not, as it chooses, and if it accepts it the franchise is taken subject to the conditions imposed. The franchise granted to the street surface railroad company and accepted by it constitutes a contract. Therefore every condition imposed by the abutting property owners of the 'local authorities,' which does not nullify or modify limitations and restrictions already imposed by law in favor of the public, and which imposes upon the grantee still greater restrictions and limitations for the public advantage, must be strictly complied with. Their power to grant or withhold consent to the

construction of street railroads is generally absolute and they may impose any conditions, however onerous or difficult to perform, which do not limit or restrict the rights of the public, as the terms upon which their consent will be given. If the terms imposed by abutting property owners are unreasonable, the company may proceed as if their consent were refused. If, however, it choose to act upon such consent it must comply with the terms of its contract. It is a general rule that grants of privileges to street railway companies by municipal corporations should be strictly construed against the grantee. But though street railway franchises are to be strictly construed, yet when the intention of the parties is clear, that intention should be given effect. What the parties, expressly or by necessary implication, contract to give or to do, they must be compelled to give or to do. The franchise carries with it not only the rights and conditions expressed, but those also which are necessarily to be implied, that is to say, those which are not simply convenient, but indispensable. It is, however, a well-settled principle that no implication will be indulged in derogation of the rights of the public, in the absence of express or plain terms of grant. An intention to grant an exclusive privilege or monopoly will not be implied, nor will a grant of privileges be given scope and effect, in restriction of public right, beyond what the plain words employed require. This is an established principle applicable in the construction of grants by the State, and it is equally applicable in the construction of grants or privileges by a municipal corporation affecting public rights. As illustrating these principles, a provision of the franchise giving the railroad company the privilege of laying all



necessary sidings, connections and switches for the proper working and accommodation of the railroad in specified streets does not justify a substantial addition to its road which is not a mere adjunct of its authorized line. Because the ordinance imposes certain terms accepted by the company as consideration, the company is not relieved from liability for license fees imposed upon electrical poles and wires as a police regulation. Again, where the company is authorized to operate a street car system in connection with which it maintains a car barn fronting on one street with its sides abutting on others, it is entitled to bring in and take out its cars over tracks upon the side streets, although such right is not expressly granted in the ordinance. And where a franchise authorized the construction of a street railway in a certain county through the streets of certain named villages, it was construed as authorizing the company to make a necessary connection on a street of one of the villages named with a branch line built through one of the other villages. Under authority to construct 'a horse railroad track or tracks' the railroad may be operated by electricity; and where it is authorized to operate by any motive power it may deem expedient and proper, it is not confined to the animal and steam power known or in practical use at the time of the grant, but it may use the electrical trolley system. Mandamus will issue to compel the performance of the obligations imposed upon a street railway company by the franchise which it has accepted and is acting under. But the observance of the conditions imposed by the local authorities when granting the franchise can only be enforced by the local authorities, unless it be a matter of such public concern that any citizen, in the interest of the public, may compel it. The federal court



has jurisdiction to grant relief by injunction in case an ordinance relating to street railways impairs an existing contract right or practically constitutes the taking of property without due process of law."

In *Railroad Co. v. Richmond*, 96 U. S. 521, an ordinance of the Council of the City of Richmond, passed September 8, 1873, provided that no engine belonging to the Richmond Railroad Company should be used on Broad Street in that city, and the final adjudication of the question came before this court. It was contended that said ordinance was unconstitutional and void, because, (1) it impaired the obligations of the contract contained in the charter of the company, which, as was claimed, granted to the company the right to propel its cars by steam, as well within the city as without; (2) it deprived the company of its property without due process of law; and, (3) it denied the company the equal protection of the laws.

The ordinance authorizing the location of the railroad contained the following stipulation: "Provided that the corporation of Richmond shall not be considered as hereby parting with any power or chartered privilege not necessary to the railroad company for constructing the said railroad and connecting the same with the depot of said company within the limits of the city."

Mr. Chief Justice Waite delivered the opinion of this court and said:

"The questions for determination in this case are:

"1. Does the municipal legislation complained

of impair the vested rights of the company under its charter?

"In answering this question, it becomes necessary to determine at the outset what the rights of the company, secured by its charter and affected by the ordinance in dispute, actually are. The right is granted the company to construct a railroad 'from such point within the corporation of Richmond, to be approved by the common council.' No designated point is fixed by the charter. That is left to the discretion of the company, subject only to the approval of the city. The power to approve certainly implies the power to reject one location and accept another; and this necessarily carries with it the further power to reserve such governmental control over the company in respect to the road, when built within the city to the point approved, as may seem to be necessary. The absolute grant of the charter is satisfied if the road is built within the city for any distance, by any route, or to any point. The company, however, desired to pass through Broad Street, and, for the present, to terminate the road upon the lots purchased for shops and warehouses, and requested the city to approve of that location. This the city was willing to do, upon condition that it should not be considered as thereby parting with any power or chartered privilege not necessary to the company for constructing its road or connecting it with the depot. These terms were proposed to the company, and accepted. At that time the city was vested with all the powers 'necessary for the good ordering and government' of persons and property within its jurisdiction. By the conditions imposed, these powers were all reserved, except to the extent of permitting the company to

construct its road upon the route designated, and connect it with the depot. All the usual and ordinary powers of the city governments over the road when constructed, and over the company in respect to its use, were expressly retained. The company, therefore, occupied Broad Street upon the same terms and conditions it would have if the charter had located the route of the road within the city, but, in terms subjected the company to the government of the city in respect to the use of the road when constructed.

"Nothing has been done since to change the rights of the parties. It is true that an attempt was made by the residents on Shockhoe Hill to induce the council to prohibit the use of locomotives within the city, and to require the company to so construct the road within Broad Street as to facilitate the crossing of the track; but all parties seemed pany to run its engines slowly and with care in the city, and its liberal contribution towards the expense of paving the street. There is nowhere in the proceedings an indication of a relinquishment by the city of its governmental control over the company or its property. The 'compromise of interests' proposed related alone to the plan of the pavement."

"It remains only to consider whether the ordinance complained of is a legitimate exercise of the power of a city government. It certainly comes within the express authority conferred by the amendment of the city charter adopted in 1870; and that, in our opinion, is no more than existed by implication before. The power to govern implies the power to ordain and establish suitable to be satisfied then with the proposition of the com-

police regulations! and that, it has often been decided, authorizes municipal corporations to prohibit the use of locomotives in the public streets, when such action does not interfere with vested rights.

“Such prohibitions clearly rest upon the maxim *sic utere tuo ut alienum non laedas*, which lies at the foundation of the police power; and it was not seriously contended upon the argument that they did not come within the legitimate scope of municipal government, in the absence of legislative restriction upon the powers of the municipality to that effect. It is not for us to determine in this case whether the power has been judiciously exercised. Our duty is at an end if we find that it exists. The judgment of the court below is final as to the reasonableness of the action of the Council.

“We conclude, therefore, that the ordinance does not impair any vested right conferred upon the company by its charter.

“2. Does it deprive the company of its property without due process of law?

“This question is substantially disposed of by what has already been said, as the claim of the company is based entirely upon the assumption of a vested right, under its charter, to operate its road by steam, both within and without the city, which we have endeavored to show is not true. All property within the city is subject to the legitimate control of the government, unless protected by ‘contract rights,’ which is not the case here. Appropriate regulation of the use of property is not ‘taking’ property, within the meaning of the constitutional prohibition.

"3. Does it deny the company the equal protection of the laws?

"The claim is, that, as this company is alone named in the ordinance, the operation of the ordinance is special only, and, therefore, invalid. No other person or corporation has the right to run locomotives in Broad Street. Consequently, no other person or corporation is or can be in like situation, except with the consent of the city. On this account, the ordinance, while apparently limited in its operation, is in effect general, as it applies to all who can do what is prohibited. Other railroad companies may occupy other streets and use locomotives there, but other streets may not be situated like Broad Street, neither may there be the same reasons why steam transportation should be excluded from them. All laws should be general in their operation, but all places within the same city do not necessarily require the same local regulation. While locomotives may with very great propriety be excluded from one street, or even from one part of a street, it would be sometimes unreasonable to exclude them from all. It is the special duty of the city authorities to make the necessary discriminations in this particular.

"On the whole, we see no error in the record, and the judgment is affirmed."

The Pacific Railroad Company v. Leavenworth Fed. Case No. 10649 (1 Dill. 393). The Pacific Railroad Company located its tracks on the streets of the City of Leavenworth, Kansas, under a statute of that State, reading as follows: "Every railroad corporation may construct its road across, along or upon \* \* \* any



street, highway, &c., but the company shall restore the same to its former state, &c. Nothing herein contained shall be construed to authorize the construction of any railroad not already located in, upon, or across any street in any corporate city or town without the assent of the corporate authorities of such city." Gen. St. Kan. 1868, p. 202. It was argued in behalf of the complainant that the statute simply clothed the city with the power to say "yes" or "no," but it did not authorize it to stipulate for terms or conditions. The court will note the similarity of the two statutes. Judge Dillon deciding this case, says: "But in this view I cannot concur. Its power is complete and it was undoubtedly the design of the legislature that the city authorities, as the representatives and guardians of the public interest of the city and its inhabitants, should have the power to prescribe as conditions of giving their assent, such lawful and proper terms as they deem expedient." In point, see *Northern Central Railroad Company v. City of Baltimore*, 21 Md. 93. "In the exercise of this authority the city said to the company, 'you may construct your road along Water Street, upon, inter alia, two conditions, 1, You shall, within a given time, build depot buildings of a given character and at a specified place; 2, you shall also grade riprap and pave the levee (which is a part of Water Street, and on and along which the right of way is granted)'. To this the company agreed, not only by the accepting of the grant of the right of way on these conditions, but by executing a contract to this effect. It is now insisted by the company that the city has no lawful power to contract for the erection of depot buildings, and hence so much of



the ordinance and contract as relates to this subject is in excess of its authority and is void. My opinion is otherwise and it is strengthened by an examination of the extensive powers with which it has been the policy of Kansas to clothe its municipal corporations.\* \* \*."

In *Pac. C. & St. L. Ry. Co. v. Hood*, 94 Fed. 618, a railroad company occupied a street in the City of Cincinnati. The ordinance granting this right contained conditions required to be performed by the company, viz., the hours when said track might be used for transmission of freight and passengers was limited from 8 o'clock p. m. to 6 o'clock a. m., and provided that no cars should be drawn over the track at any other hour and at no greater speed than six miles per hour. Cars were run on the track at 6:50 a. m., in violation of the ordinance, and Hood's horses became frightened, ran away and caused injuries, from which he died. In an action for damages the Circuit Court of Appeals, for the Sixth Circuit, had occasion to construe the ordinance. The Court said: "If authority is given to construct a railroad upon the streets of a city or town, provided the company first obtains the consent of the municipal corporation, or whereby the delegation of power from the legislature, the municipality itself grants the right, reasonable conditions may be annexed to the grant and imposed upon the company, as to the construction and operation of its road, such as are deemed essential for the protection of the public interest and safety; and if these are accepted by the railway company they are binding upon the parties. \* \* \* It is this legislative authority, derived either immediately or through the authorized action of the municipality,

which protects a railroad company in the use of streets for railroad purposes from prosecution and suit for a public nuisance; and when the consent of a city or town is required, the importance of an ordinance like the one in question is apparent. When the ordinance prescribes conditions on which the right is granted these become binding and the right to use the streets must be exercised strictly within the provisions of the ordinance. *Railroad Company v. Bingham*, 87 Tenn. 522, is a leading and instructive case upon this subject."

"It is conceded, and could not be controverted, that the legislature of Ohio conferred upon the city power to grant the right to construct and use the railroad upon the public landing, with power to annex conditions. The existence of the power to consent to such use of the streets and highways in the city, and the power to impose valid and binding conditions, were fully recognized in the well-considered case of *Louisville Trust Co. v. City of Cincinnati*, 47 U. S. App. 36, 22 C. C. A. 534, and 76 Fed. 296; *Id.*, 78 Fed. 307. It will admit of the question whether, in the absence of constitutional or legislative restriction, municipal corporations, by virtue of the police authority over streets, and the power to protect the safety of persons and property, might not impose, by ordinance duly enacted, conditions upon the operation of a railway through the streets of a city, similar to the provisions contained in the ordinance now in question. 1 Dill. Mun. Corp. (4th Ed.) §§393, 713; *Richmond, F. & P. R. Co. v. City of Richmond*, 96 U. S. 521; *Chicago, B. & Q. R. Co. vs. Nebraska*, 170 U. S. 57, 18 Sup. Ct. 513; *Gaslight Co. v. Murphy*, 170 U. S. 78, 18 Sup. Ct. 505. It being established, and here conceded, that the city was vested with power to

make the grant with conditions annexed, it is necessary for us to decide to what extent the power to impose conditions could exist in the absence of express legislative authority to do so. It is not to be doubted that the purpose of the legislature in conferring upon the municipality the power to consent to the use of the public landing with conditions was to enable the city to properly exercise its police power in the protection of persons and property against great danger in a public and much used place, such as this landing. And in this view it is not open to reasonable question that the ordinance as enacted combines contractual as well as police provisions, the latter being in the interest of the public safety. In so far as the ordinance granted the right of franchise to construct and operate a railway upon this public ground, it became, when accepted, a contract; but the provision by which the use of the track was prohibited during the day time was in its nature and effect a municipal or police regulation operating in the interest of the public safety. *McDonald v. Railway Co.*, 43 U. S. App. 79, 20 C. C. A. 322, and 74 Fed. 104; *Hayes v. Railroad Co.*, 111 U. S. 228, 4 Sup. Ct. 369; *Joy v. City of St. Louis*, 138 U. S. 42, 11 Sup. Ct. 243. This police provision having been enacted pursuant to clear legislative authority, the fact that it is found in an ordinance, which also contains contract provisions does not change the result or affect the essential character of the power exercised; and this police provision, being thus specifically authorized and duly enacted, unquestionably has, within the corporate limits, the force of a law enacted by the legislature of the State. *Hayes v. Railroad Co.*, 111 U. S. 228, 4 Sup. Ct. 369; *Robbins v. City of Chicago*, 4 Wall. 657; *City of Chicago v. Robbins*, 2 Black, 418; *Doran v. Flood*,

47 Fed. 543; *McDonald v. Railway Co.*, 43 U. S. App. 79, 20 C. C. A. 322, and 74 Fed. 104; 1 Dill. Mun. Corp. (4th Ed.) §§308, 393. It results from this view that the operation of the railroad by plaintiff in error during the day time, contrary to the provisions of the ordinance was a violation of the law, and constituted a nuisance."

Mr. Dillon in his work on *Municipal Corporations* (5th Ed.), Vol. 111, §1229, p. 1952, says:

"So far as concerns the power of the municipality to attach conditions and restrictions to a grant or consent, no fundamental distinction appears in the decisions between a general delegation of authority to a municipality to grant consents or rights to use streets for railroad, telegraph, telephone, and other public purposes, and a simple requirement, whether constitutional or statutory, that no streets shall be used for these purposes without the consent of the municipality. The power possessed by the state to attach as a condition to the grant of a franchise to a quasi-public corporation the performance of duties beneficial to the public may be exercised by the municipality under a delegated power to grant to such a corporation the use of its streets; and when, under the Constitution or the statutes of a State, a railroad company or other public service corporation is forbidden to construct its railroad, telegraph, or telephone line, or other structures in or upon the streets of a city 'without the consent of' the city or of specified local authorities, the municipal authorities are not limited to a simple granting or denial of the right of way, but may prescribe conditions on which the consent is given, and valid conditions or restric-

tions accepted by the railroad or other public service corporation are binding upon the parties." And in support of his text he cites the following cases:

- Richmond, F. & P. R. Co. v. Richmond, 96 U. S. 521;
- Pacific R. Co. v. Leavenworth, 1 Dill. C. C. R. 393;
- Pittsburg, C. & St. L. R. Co. v. Hood, 94 Fed. Rep. 618;
- Mercantile Trust & Deposit Co. v. Collins Park & B. R. Co., 101 Fed. Rep. 347;
- Southern Bell T. & T. Co. v. Richmond, 103 Fed. Rep. 31, aff'g. 98 Fed. Rep. 671;
- Bellville v. Citizens' Horse R. Co., 151 Ill. 171;
- Indianapolis & C. R. Co. v. Lawrenceburg, 34 Ind. 304;
- City R. Co. v. Citizens' St. R. Co. (Ind.), 52 N. E. Rep. 157;
- Mordhurst v. Ft. Wayne & S. W. Traction Co., 163 Ind. 268;
- Postal Tel. & Cable Co. v. Newport (Ky.) 76 S. W. Rep. 159;
- Northern Cent. R. Co. v. Baltimore, 21 Md. 93;
- Rapid R. Co. v. Mt. Clemens, 118 Mich. 133;
- Traverse City Gas Co. v. Traverse City, 130 Mich 17;
- Detroit v. Detroit City R. Co., 76 Mich. 421;
- Springfield v. Robberson Ave. R. Co., 69 Mo. App. 514;
- Humphreys v. Bayonne, 55 N. J. L. 241, 243;



- Rutherford v. Hudson River Traction Co., 73 N. J. L. 227;
- Jersey City & B. R. Co. v. Jersey City & H. H. R. Co., 20 N. J. Eq. 61, 360;
- People v. Barnard, 110 N. Y. 548;
- Allegheny v. Millville, E. & S. St. R. Co., 159 Pa. 411;
- Plymouth v. Chestnut Hill & N. R. Co., 168 Pa. 181;
- Allegheny v. People's Nat. Gas & P. Co., 172 Pa. 632;
- Philadelphia v. Empire Passenger R. Co., 177 Pa. 382;
- Minerville v. Schuylkill Elect. R. Co., 205 Pa. 394;
- McKeesport v. Pittsburg, M. & C. R. Co., 213 Pa. 542, 544;
- Muncy Elect. L. H. & P. Co. v. People's Elect. L. H. & P. Co., 218 Pa. 636;
- Spring City v. Montgomery & C. Elect. R. Co., 35 Pa. Super. Ct. 533, 538.

Under the Massachusetts statute an application to a municipality for the location of a street railroad must precede the exercise of corporate power by the company, and conditions attached to the location must also be accepted by the company, hence these conditions, if lawful, are qualifications of the corporate right of the company and it cannot, while it continues to exercise its franchises, complain of their enforcement. *Clinton v. Worcester St. Ry. Co.*, 199 Mass. 279. In New Jersey restrictions and conditions attached to the municipality's location of the tracks of a street railroad company



are obligatory upon purchases of the railway and its franchises without an express assumption thereof.

Rutherford v. Hudson River Traction Co., 73  
N. J. L. 227.

Counsel for appellant in error attempts to draw a distinction between Sections 6841 and 6842. That is, he contends that where a railroad company desires to locate its tracks on a county road, then the County Court is authorized to agree upon the extent, terms and conditions upon which the use of the road may be appropriated, but where it is desired to locate the road on a street, or highway within the limits of a municipality, then the municipality can only designate the particular road or street; that it is not authorized to agree upon terms or authorized to make conditions respecting the occupancy of the street. The Supreme Court of Oregon, however, as we view its decisions, has construed both of these sections together, in *McQuaid v. Portland-Vancouver Ry. Co.*, 18 Ore., p. 248, (Sections 3242 and 3243 mentioned in said opinion now being Sections 6841 and 6842, L. O. L.), and says:

"Section 3242 thereof authorizes a corporation organized for the construction of any railway, etc., whenever it shall be necessary or convenient, in the location of its road, to appropriate any such public road, etc., to appropriate so much thereof as may be necessary or convenient in the location and construction of its road; and it authorizes the county court of the county wherein such public road, etc., may be, unless within the corporate limits of a municipal corporation, to agree with the corporation constructing the road upon the ex-

tent, terms and conditions upon which the same may be appropriated, or used and occupied, by such corporation. And Section 3243 thereof provides, in effect, that if the public highway or grounds be within the limits of any town, whether incorporated or not, that such corporation shall locate its road upon such particular road, street or alley, or public grounds, within such town, as the local authorities mentioned in the last section (referring to section 3242) and having charge thereof, shall designate. The two sections, however, respectively provide,—the former one, that, if such county court and corporation shall be unable to agree upon the extent, terms and conditions upon which the public road, etc., may be appropriated, etc., such corporation may appropriate so much thereof as may be necessary and convenient in the location and construction of its road; and the latter one, that if such local authorities shall fail or refuse to designate the particular road, etc., upon which such corporation shall locate its road, within a reasonable time, when requested, the corporation may make such appropriation without reference thereto. These provisions of the statute are **ambiguous, unsatisfactory and absurd**; and about all that can be gathered from them is that they authorize the appropriation by a railway corporation of so much of a public road or street as may be **necessary and convenient** in the location and construction of its road. The appropriation, however, is only of a part of the easement or use secured to the public in the land embraced within the public road or street. The legislative jurisdiction in such matters is limited to a control of the use which belongs to the public, and it should not be presumed that the legislature intended to exercise it in violation of private rights and interests. It au-

thorizes the appropriation of the part of the public road or street as such and amounts to no more than a partial change of the manner of its use. It does not attempt to interfere with the private rights of the owners of the land abutting upon the road or street; and I doubt very much whether the legislature has the legal right, by such an act, to destroy or seriously impair rights of that character. They are virtually private property, and cannot be taken by a railway corporation without compensation being first made or secured in such manner as may be prescribed by law. Article 11, § 4, Const. Or. I do not regard the occupation of a public highway by a railway corporation, under the appropriation authorized by the statute in question, as anything more than a **kind of sufferance**. The railway corporation is permitted by the statute to appropriate so much of the highway as may be necessary or convenient in the location and construction of its road; but the use thereof by the public is not abridged. It is simply extended to the railway corporation, and the latter admitted to its enjoyment in common with the former."

We contend, therefore, that the provisions of Ordinance No. 599, reserving power to regulate and prohibit steam locomotives, are valid and binding on the grantee therein.

**City of Portland could not contract away its Police Power, and, therefore, could lawfully enact and enforce Ordinance No. 18491, under such power.**

Mr. Joyce in his work on franchises, Section 138, says:

"Again, it is not within the power of the State to permanently divest itself, by action or inaction

of its police powers, and this is also true as to any subordinate subdivision or agency of the State, acting under a delegation of authority from the State; nor can a State by any contract divest itself of the power to make police regulations. The right to exercise the police power is a continuing one that cannot be limited or contracted away by the State or its municipality, nor can it be destroyed by compromise, as it is immaterial upon what consideration the attempted contract is based. The exercise of the police power in the interest of the public health and safety is to be maintained unhampered by contracts in private interests, and uncompensated obedience to an ordinance passed in its exercise is not violative of property rights protected by the Federal Constitution; so an ordinance of a municipality, valid under the state law as construed by its highest court, which compels a railroad to repair a viaduct constructed, after the opening of the railroad by a city in pursuance of a contract relieving the railroad, for a substantial consideration, from making any repairs thereon for a term of years is not void under the contract or the due process clause of the Constitution."

Under the laws of Oregon at the time of the organization of the Oregon Central Railroad Company the constitution of Oregon provided among other things as follows:

"Corporations may be formed under general laws, but shall not be created by special laws, except for municipal purposes. \* \* \* All laws passed pursuant to this section may be altered, amended, or repealed, but not so as to impair or destroy any vested corporate rights." (Constitution of Oregon, article II, § 2.)

In *Ex parte Koehler*, 23 Fed. 529, it was held that the vested right of a railroad company to collect reasonable fares and charges was like all other interests, subject to the police power of the State, and as said by the Supreme Court of Oregon in the *Portland Ry. L. & P. Co. v. Railroad Commission*, 105 Pac. at page 713: "A grant by the Legislative Assembly to a corporation of authority to employ the right of eminent domain necessarily implies a reservation of the police power to regulate and prescribe the measure of compensation which is determined to be reasonable, and which may be collected for transportation of passengers and freight; and, if a common carrier could, by a contract stipulating the continuance of a specified rate of fares and freight for a given time, prevent any interference with such agreement, by invoking the clauses of the organic act relied upon herein, it would thereby become superior to the Legislature, which doctrine will never be acknowledged by courts. The police power, being necessary to the preservation of the rights of the citizen and to the maintenance of the autonomy and the authority of the state, cannot be bargained away in any manner whatever." The Legislature, therefore, could not by a general law authorizing railroad companies to locate their roads in city streets subject to the consent of the municipality, or even without the consent of a municipality in case of a lack of agreement under the constitutional reservation herein quoted, forever contract away its right under the police power to regulate such railroads.

The charter of the City of Portland in force at the time of the enactment of Ordinance No. 16491 provided as follows:

"Section 3: The City of Portland shall be in-



vested within its limits with authority to perform all public services and with all governmental powers except such as are expressly conferred by law upon other public corporations and subject to the limitations prescribed by the constitution and laws of the state, except as hereinafter provided."

"Section 72: The Council shall have and exercise exclusively all legislative powers and authority, of the City of Portland and no legislative powers or authority, either express or implied, shall be exercised by any other person or persons, board or boards, other than the Council. The Council shall have full power and authority, except as herein otherwise provided, to exercise all powers conferred upon the city by this Charter and the constitution and laws of the State of Oregon."

"Section 73: The Council has power and authority, subject to the provisions, limitations and restrictions in this Charter contained:

"(1) To exercise within the limits of the City of Portland all the powers commonly known as the police power to the same extent as the State of Oregon has or could exercise said power within said limits.

"(60) Except as otherwise provided in this Charter or in the constitution of laws of the State of Oregon, to regulate and control for any and every purpose the use of the streets, highways, alleys, sidewalks, public thoroughfares, public places and parks of the city; to regulate the use of streets, roads, highways and public places for foot passengers, animals, bicycles, automobiles and vehicles of all descriptions.



"(63) To control and limit traffic on the streets, avenues and elsewhere."

Sections 94, 103, 104, 105 and 107 of the Charter of the City of Portland, provide:

"(Section 94) The Council may, subject to the limitations and conditions contained in this charter, grant for a limited time specific franchises or rights in or to the public property or places mentioned in the preceding sections. Every such grant shall specifically set forth and define the nature, extent and duration of the franchise or right thereby granted, and no franchise or right shall pass by implication. At all times the power and right reasonably to regulate in the public interest the exercise of the franchise or right so granted shall remain and be vested in the Council and said power and right cannot be divested or granted."

"(Section 103) "The Council has power and authority by ordinance duly passed to agree with any corporation, firm or person constructing a commercial railroad and desiring to enter the city, upon the extent, terms and conditions upon which the streets, alleys or public grounds of the city may be appropriated, used or occupied by such railroad, and upon the manner, terms and conditions under which the cars and locomotives of such railroad may be run over and upon such streets, alleys and public grounds; such agreement shall be subject to the provisions and requirements of Sections 95, 97, 100 and 101 of this Charter. No exclusive right for the aforesaid purposes shall be granted to any corporation, firm or person and the use of all such rights shall at all times be subject to regulation by the Council.

"In addition to the other requirements of this Charter, every ordinance granting such right shall be upon the condition that such grantee shall allow any other railroad company to use in common with it the same track or tracks upon obtaining the consent of the Council expressed by ordinance, each paying an equitable and proper portion for the construction and repair of the tracks and appurtenances used by such railroad companies jointly."

"(Section 104) No exclusive franchise or privilege shall be granted for the laying of pipes, wires or conduits or for the use of any street, alley, highway or other public place or part thereof, and no grantee of such franchise or privilege shall be entitled to sub-let the same or allow any other to use the same without the consent of the city expressed by ordinance duly passed."

"(Section 105) The Council of the City of Portland shall have at all times power to regulate by ordinance street railroads, tramways and other railroads and the use of tracks and cars; to compel the owners of two or more such roads using or having the right to use the same streets, bridges or elevated railways, for any distance not exceeding five blocks over said street, and over the entire length of bridges and elevated roadways to use the same tracks and to divide the cost of construction and cost of maintenance thereof equitably between them; to regulate the rates of speed and the use of streets by street railways and other railroads and to pass ordinances to protect the public from danger or inconvenience in the operation of such roads."

"(Section 107) No franchise shall be granted for any extension over streets or public places of the city to any street railway company or to any

one for its use for a longer period than the life of the franchises held, owned by and under which said company is operating which has the longest period to run and no such franchise shall be granted for a longer period than twenty-five years."

In *Northern Pacific Railway Company v. Duluth*, 208 U. S. 583, this Court, speaking through Justice Day, said:

"There can be no question as to the attitude of this court upon this question, as it has been uniformly held that the right to exercise the police power is a continuing one; that it cannot be contracted away, and that a requirement that a company or individual comply with reasonable police regulations without compensation is the legitimate exercise of the power and not in violation of the constitutional inhibition against the impairment of the obligation of the contracts. In *New York & New England Railroad Company v. Bristol*, 151 U. S. 556, 576, the doctrine was thus laid down by Chief Justice Fuller, speaking for the court:

"It is likewise thoroughly established in this court that the inhibitions of the Constitution of the United States upon the impairment of the obligation of contracts, or the deprivation of property without due process, or of the equal protection of the laws by the States, are not violated by the legitimate exercise of legislative power in securing the public safety, health and morals. The governmental power of self-protection cannot be contracted away, nor can the exercise of rights granted, nor the use of property, be withdrawn from the implied liability to governmental regulations in particulars essential to the preservation of the community from in-

jury. *Beer Co. v. Massachusetts*, 97 U. S. 25; *Fertilizing Co. v. Hyde Park*, 97 U. S. 659; *Barbier v. Connolly*, 113 U. S. 27; *New Orleans Gas Company v. Louisiana Light Company*, 115 U. S. 350; *Mugler v. Kansas*, 123 U. S. 623; *Budd v. New York*, 143 U. S. 517.'

"The principle was recognized and enforced in *Chicago, Burlington & Quincy R. R. Co. v. Chicago*, 166 U. S. 226, where it was held that the expenses incurred by the railroad company in erecting gates, planking at crossings, etc., and the maintenance thereof, in order that the road might be safely operated, must be deemed to have been taken into account when the company accepted its franchise from the State, and the expenses incurred by the railroad company, though upon new streets, might be required as essential to the public safety. In *Detroit Railroad Co. v. Osborne*, 189 U. S. 383, it was held that the State of Michigan might compel a street railroad to install safety appliances at an expense to be divided with a steam railroad company occupying the same street, notwithstanding the steam railroad was the junior occupier of the street. The subject was further under consideration in *New Orleans Gas Light Co. v. Drainage Commission of New Orleans*, 197 U. S. 453, where it was held, that although the gas company had permission from the city to lay its pipes under the streets, it might be required to remove the same at its own expense, in the exercise of the police power in the interest of the public, in order to make way for a system of drainage which was required, in the interest of the public health, without compensation to the gas company; and that uncompensated obedience to regulations for public safety under the police power of the State was not a taking of property without a due process of law.



"The same principles were recognized and the previous cases cited in *Chicago, Burlington & Quincy Ry. Co. v. People of the State of Illinois ex rel. Drainage Commissioners*, 200 U. S. 561, and again in *Union Bridge Co. v. United States*, 204 U. S. 364. The result of these cases is to establish the doctrine of this court to be that the exercise of the police power in the interest of public health and safety is to be maintained unhampered by contracts in private interests, and that uncompensated obedience to laws passed in its exercise is not violative of property rights protected by the Federal Constitution.

"In this case the Supreme Court of Minnesota has held that the charter of the company, as well as the common law, required the railroad, as to existing and future streets, to maintain them in safety, and to hold its charter rights subject to the exercise of the legislative power in this behalf, and that any contract which undertook to limit the exercise of this right was without consideration, against public policy and void. This doctrine is entirely consistent with the principles decided in the cases referred to in this court. But it is alleged that at the time this contract with the railroad company it was at least doubtful as to what the rights of the parties were, and that the contract was a legitimate compromise between the parties, which ought to be carried out. But the exercise of the police power cannot be limited by contract for reasons of public policy, nor can it be destroyed by compromise, and it is immaterial upon what consideration the contracts rest, as it is beyond the authority of the State or the municipality to abrogate this power so necessary to the public safety. *Chicago, Burlington & Quincy R. R. Co. v. Nebraska ex rel Omaha*, 170 U. S. 57."

In *Fertilizing Co. v. Hyde Park*, 97 U. S., at page 663, Mr. Justice Swayne said:

"This case was brought here by a writ of error to the Supreme Court of the State of Illinois.

"The alleged ground of our jurisdiction is, that the record presents a question of Federal jurisprudence. A brief statement of the facts will be sufficient for the purposes of this opinion.

"The plaintiff in error was incorporated by an act of the legislature, approved March 8, 1867. The act declared that the corporation should 'have continued succession and existence for the term of fifty years.' The fourth and fifth section are as follows:

" 'Sect. 4. Said corporation is hereby authorized and empowered to establish and maintain chemical and other works at the place designated herein, for the purpose of manufacturing and converting dead animals and other animal matter into an agricultural fertilizer, and into other chemical products, by means of chemical, mechanical, and other processes.

" 'Sect. 5. Said chemical works shall be established in Cook County, Illinois, at any point south of the dividing line between townships 37 and 38. Said corporation may establish and maintain depots in the City of Chicago, in said county, for the purpose of receiving and carrying off, from and out of said city, any and all offal, dead animals, and other animal matter, which they may buy or own, or which may be delivered to them by the city authorities and other persons.'

"The company organized pursuant to the charter.



Its capital stock is \$250,000, all of which has been paid up and invested in its business.

"It owns ground and has its receiving depot about three miles from Chicago. The cost of both exceeded \$15,000. Thither the offal arising from the slaughtering in the city was conveyed daily. The chemical works of the company are in Cook County, south of the dividing line of townships 37 and 38, as required by the charter. When put there, the country around was swampy and nearly uninhabited, giving little promise of further improvement. They are within the present limits of the village of Hyde Park. The offal procured by the company was transported from Chicago to its works through the village by the Pittsburg, Fort Wayne, and Chicago Railroad. There was no other railroad by which it could be done. The court below, in its opinion, said:

" 'An examination of the evidence in this case clearly shows that this factory was an unendurable nuisance to the inhabitants for many miles around its location; that the stench was intolerable, producing nausea, discomfort, if not sickness, to the people; that it depreciated the value of property, and was a source of immense annoyance. It is, perhaps, as great a nuisance as could be found or even created; not affecting as many persons as if located in or nearer to the city, but as intense in its noisome effects as could be produced. And the transportation of this putrid animal matter through the streets of the village, as we infer from the evidence, was offensive in a high degree both to sight and smell.'

"This characterization is fully sustained by the testimony.

"In March, 1869, the charter of the village was revised by the legislature, and the largest powers of police and local government were conferred. The trustees were expressly authorized to 'define or abate nuisances which are, or may be, injurious to the public health,'—to compel the owner of any grocery-cellar, tallow-chandler shop, soap factory, tannery, or other unwholesome place, to cleanse or abate such place, as might be necessary, and to regulate, prohibit, or license breweries, tanneries, packing-houses, butcher-shops, stock-yards, or establishments for steaming and rendering lard, tallow-offal, or other substances, and all establishments and places where any nauseous, offensive, or unwholesome business was carried on. The sixteenth section contains a proviso that the powers given should not be exercised against the Northwestern Fertilizing Company until after two years from the passage of the act. This limitation was evidently a compromise by conflicting parties.

"On the 5th of March, 1867, a prior act, giving substantially the same powers to the village, was approved and became a law. This act provided that nothing contained in it should be construed to authorize the officers of the village to interfere with parties engaged in transporting any animal matter from Chicago, or from manufacturing it into fertilizer or other chemical product. The works here in question were in existence and in operation where they now are before the proprietors were incorporated.

"After the last revision of the charter the municipality passed an ordinance whereby, among other things, it was declared that no person should transport any offal or other offensive or unwholesome matter through the village, and that any person

employed upon any train or team conveying such matter should be liable to a fine of not less than five nor more than fifty dollars for each offense; and that no person should maintain or carry on any offensive or unwholesome business or establishment within the limits of the village, nor within one mile of those limits. Any person violating either of these provisions was subjected to a penalty of not less than fifty nor more than two hundred dollars for each offense, and to a like fine for each day the establishment or business should be continued after the first conviction.

"After the adoption of this ordinance and the expiration of two years from the passage of the act of 1869, notice was given to the company, that, if it continued to transport offal through the village as before, the ordinance would be enforced. This having no effect, thereafter, on the 8th day of January, 1873, the village authorities caused the engineer and other employes of the railway company, who were engaged in carrying the offal through the village, to be arrested and tried for violating the ordinance. They were convicted, and fined each fifty dollars. This bill was thereupon filed by the company. It prays that further prosecutions may be enjoined, and for general relief. The Supreme Court of the State, upon appeal, dismissed the bill, and the company sued out this writ of error.

"The plaintiff in error claims that it is protected by its charter from the enforcement against it of the ordinance complained of, and that its charter is a contract within the meaning of the contract clause of the Constitution of the United States. Whether this is so, is the question to be considered.

"The rule of construction in this class of cases

is that it shall be most strongly against the corporation. Every reasonable doubt is to be resolved adversely. Nothing is to be taken as conceded but what is given in unmistakable terms, or by an implication equally clear. The affirmative must be shown. Silence is negation, and doubt is fatal to the claim. This doctrine is vital to the public welfare. It is axiomatic in the jurisprudence of this court. It may be well to cite a few cases by way of illustration. In *Rector, etc., of Christ Church v. The County of Philadelphia* (24 How. 301), in *Tucker v. Ferguson* (22 Wall. 527), and in *West Wisconsin Railroad Co. v. Board of Supervisors* (93 U. S. 595), property had been expressly exempted for a time from taxation. Taxes were imposed contrary to the terms of the exemption in each case. The corporations objected. This court held that the promised forbearance was only a bounty or gratuity, and that there was no contract. In *The Providence Bank v. Billings & Pittman* (4 Pet. 515), the bank has been incorporated with the powers usually given to such institutions. The charter was silent as to taxation. The legislature imposed taxes. 'The power to tax involves the power to destroy.' *McCulloch v. Maryland*, 4 Wheat. 316. The bank resisted, and brought the case here for final determination. This court held that there was no immunity, and that the bank was liable for the taxes as an individual would have been. There is the same silence in the charter here in question as to taxation and as to liability for nuisances. Can exemption be claimed as to one more than the other? Is not the case just cited conclusive as to both?

"Continued succession is given to corporations to prevent embarrassment arising from the death of their members. One striking difference between



the artificial and a natural person is, that the latter can do anything not forbidden by law, while the former can do only what is so permitted. Its powers and immunities depend primarily upon the law of its creation. Beyond that it is subject, like individuals, to the will of the law-making power.

"If the intent of the legislature touching the point under consideration be sought in the charter and its history, it will be found to be in accordance with the view we have expressed as matter of law. Three days before the charter of the plaintiff in error became a law, the legislature declared that the power of the village as to nuisances should not extend to those engaged in the business to which the charter relates. The subject must have been fully present to the legislative mind when the company's charter was passed. If it were intended the exemption should be inviolable, why was it not put in the company's charter as well as in that of the village? The silence of the former, under the circumstances, is a pregnant fact. In one case it was doubtless known to all concerned that the restriction would be irrepealable, while in the other, that it could be revoked at any time. In the revised village charter of 1869, the exemption was limited to two years from the passage of the act. This was equivalent to a declaration that after the lapse of the two years the full power of the village might be applied to the extent found necessary. Corporations in such cases are usually prolific of promises, and the legislature was willing to await the event for the time named.

"That a nuisance of a flagrant character existed, as found by the court below, is not controverted. We cannot doubt that the police power of the State was applicable and adequate to give an effectual

remedy. That power belonged to the States when the Federal Constitution was adopted. They did not surrender it, and they all have it now. It extends to the entire property and business within their local jurisdiction. Both are subject to it in all proper cases. It rests upon the fundamental principle that every one shall so use his own as not to wrong and injure another. To regulate and abate nuisances is one of its ordinary functions. The adjudged cases showing its exercise where corporate franchises were involved are numerous.

"In *Coates v. The Mayor and Aldermen of the City of New York* (7 Cow. (N. Y.) 585), a law was enacted by the legislature of the State on the 9th of March, 1813, which gave to the city government power to pass ordinances regulating, and, if necessary, preventing the interment of dead bodies within the city; and a penalty of \$250 was authorized to be imposed for the violation of the prohibition. On the 7th of October, 1823, an ordinance was adopted, forbidding interments or the depositing of dead bodies in vaults in the city south of a designated line. A penalty was prescribed for its violation. The action was brought to recover the penalty for depositing a dead body in a vault in Trinity churchyard. A plea was interposed, setting forth that the locus in quo was granted by the King of Great Britain, on the 6th of May, 1697, to a corporation by the name of the 'Rector and Inhabitants of the City of New York in Communion with the Protestant Episcopal Church of England,' and their successors forever, as abd for a churchyard and burying place, with the rights, fees, etc.; that immediately after the grant of the land was appropriated, and thenceforward was used as and for a cemetery for the interment of dead bodies; that the rector and wardens of Trinity Church were the



same corporation; and that the body in question was deposited in the vault in the churchyard by the license of that corporation. A general demurrer was filed, and the case elaborately argued.

"The validity of the ordinance was sustained. The court held that 'the act under which it was passed was not unconstitutional, either as impairing the obligation of contracts, or taking property for public use without compensation, but stands on the police power to make regulations in respect to nuisances.' It was said: 'Every right, from absolute ownership in property down to a mere easement, is purchased and holden subject to the restriction that it shall be so exercised as not to injure others. Though at the time it be remote and inoffensive, the purchaser is bound to know at his peril that it may become otherwise by the residence of many people in its vicinity, and that it must yield to by-laws and other regular remedies for the suppression of nuisances.'

"In such cases, prescription, whatever the length of time, has no application. Every day's continuance is a new offense, and it is no justification that the party complaining came voluntarily within its reach. Pure air and the comfortable enjoyment of property are as much rights belonging to it as the right of possession and occupancy. If population, where there was none before, approaches a nuisance, it is the duty of those liable at once to put an end to it. *Brady v. Weeks*, 3 Barb. (N. Y.) 157.

"The legislature of Massachusetts, on the 1st of February, 1827, incorporated the 'Boston Beer Company,' 'for the purpose of manufacturing malt liquors in all their varieties in the City of Boston,' etc. By an act of June, 1869, the manufacture of

malt liquors to be sold in Massachusetts, and brewing and keeping them for sale, were prohibited, under penalties of fine and imprisonment and the forfeiture of the liquors to the Commonwealth. In *Beer Company v. The Commonwealth*, the Supreme Court of Massachusetts held that 'the act of 1869 does not impair the obligations of the contract contained in the charter of the claimant, so far as it relates to the sale of malt liquors, but is binding on the claimant to the same extent as on individuals.

" 'The act is in the nature of a police regulation in regard to the sale of a certain article of property, and is applicable to the sale of such property by individuals and corporations, even where the charter of the corporation cannot be altered or repealed by the legislature.'

" 'This court unanimously affirmed that judgment. In our opinion, Mr. Justice Bradley, speaking for the court, said: 'Whatever difference of opinion may exist as to the extent and boundaries of the police power, and however difficult it may be to render a satisfactory definition of it, there seems to be no doubt that it does extend to the protection of the lives, health and property of the citizens, and to the preservation of good order and the public morals.' The judgment here was placed also upon another ground. *Beer Company v. Massachusetts*, *supra*, p. 25.

" 'Perhaps the most striking application of the police power is in the destruction of building to prevent the spread of a conflagration. This right existed by the common law, and the owner was entitled to no compensation. 2 Kent. Com. 339, and notes 1 and a and b. In some of the States it is regulated by statute. *Russel v. The Mayor of New*

York, 2 Den. (N. Y.) 461; American Print Works v. Lawrence, 23 N. J. L. 590.

"In the case before us it does not appear that the factory could not be removed to some other place south of the designated line, where it could be operated, and where offal could be conveyed to it from the city by some other railroad, both without rightful objection. The company had the choice of any point within the designated limits. In that respect there is no restriction.

"The charter was a sufficient license until revoked; but we cannot regard it as a contract guaranteeing, in the locality originally selected, exemption for fifty years from the exercise of the police power of the State, however serious the nuisance might become in the future, by reason of the growth of population around it. The owners had no such exemption before they were incorporated, and we think the charter did not give it to them.

"There is a class of nuisances designated 'legalized.' These are cases which rest for their sanction upon the intent of the law under which they are created, the paramount power of the legislature, the principle of 'the greatest good of the greatest number,' and the importance of the public benefit and convenience involved in their continuance. The topic is fully discussed in Wood on Nuisances, c. 23, p. 781. See also 4 White, Actions and Defences, 728. This case is not within that category. We need not, therefore, consider the subject in this opinion."

In North Chicago City Ry. Co. v. Lake View, 105 Ill. 207, the Town of Lake View enacted an ordinance prohibiting the railway company from using steam for the

purpose of propelling its cars along a certain street. It was claimed that the town had no authority to pass the ordinance prohibiting the use of steam for the purpose of propelling the company's cars, and that under the charter of the company it was authorized to use this motive power. While this case is not directly in point, yet the principle involved in the case at bar is there. In this case the court held that it was the intent of the legislature, in granting the charter, that the company should use horsepower instead of steam power to propel its cars. However, the opinion of the court proceeds upon the theory that in the exercise of the police power the city would have the right to prohibit the use of steam, if justified under all of the circumstances of the case, and says:

"As already conceded, there are many innoxious useful things which the municipal authorities of a town or city could not lawfully, under a general grant of power like the one in question, declare nuisances,—such, for instance, as the exercise of certain trades and callings, as, that of a physician, druggist, and the like. In all such cases as these, courts, acting upon their own experience and knowledge of human affairs, would say, as matter of law, the exercise of these trades or callings, or things of like character, are not nuisances, and that any attempt to so declare them by the municipal authorities would be an unwarranted abuse of their power. On the other hand, there are many things which courts, without proof, will, on the same principle, declare nuisances. Such, for instance, would be the digging of a pit, or the erection of a house, or other obstruction, in a public highway; and an ordinance passed by a town or city having, as in the present case, a general power over the subject,



declaring such obstructions nuisances, would be valid on its face, and a conviction might properly be had under it, without any extrinsic proof to show the act complained of was in fact a nuisance. In all such cases it is sufficient to show the existence of the fact constituting the nuisance. And so we regard the use of steam, in the manner specified in the ordinance, for the purpose of propelling street cars along a public street in a thickly populated town, in the absence of any legislative grant authorizing it to be done. Such a use of steam, under the circumstances stated, is, per se, a nuisance.

“With respect to the remaining question little need be said. It is conceded the company’s charter authorizes it to maintain and operate a street railway along and over the street in question, and it is contended that, inasmuch as the charter is silent as to the character of the power to be used in propelling the company’s cars, the company has the option to use for that purpose either steam or horsepower, as it may prefer. We think, in such case it would be more reasonable to hold the legislature intended the company should use that kind of motive power in propelling its cars which would be most conducive to the best interests and safety of the public having occasion to use the street as a common highway, and which was then in ordinary use in this state. Giving the charter this construction, horse, and not steam, power was clearly intended.”

That is the contention in the case at bar, that the Council of the City of Portland, at the time of the enactment of Ordinance 599, had in mind that the city would grow, and that the use of steam would become obnox-

ious and, therefore, said ordinance is within the ruling of the Illinois case just above cited.

**Buffalo & Niagara Falls Ry. Co. v. City of Buffalo,**  
5 Hill (N. Y.) 209, 211, the Court said:

"Looking also to the evil at which the amendment of the city charter was obviously aimed, we cannot doubt that the ordinance in question comes fairly within the provision of the act. We need no other proof of the fact that what may be derived from our own observation and the experience of the times, that a train of cars impelled by the force of steam power through a populous city, may expose the inhabitants, and all who resort thither for business or pleasure, to reasonable perils, so much so, that unless conducted with more than human watchfulness, the running of the cars may well be regarded as a public nuisance. It is most fit and proper, therefore, that they should be placed under the control and regulation of the city authorities, and that such authorities should possess a discretionary power to remove the danger by directing a change in the mode of impelling the train."

In **Brown v. City**, 47 Pa. 329, the Court said:

"In respect to the care, regulation, and control of the highways within its corporate limits, the City of Philadelphia exercises a portion of this power of the commonwealth subject only to the higher control of the state and the use of the public, and therefore a written license, granted by the City for a valuable consideration authorizing the holder to connect his property with the city railroad by a turnout and track, is not such a contract as will prevent the city from removing said railroad, when-



ever in the opinion of its authorities such an action will tend to the benefit of the public."

Mr. Elliott on Roads and Street, 3d Ed. Vol. 2, Section 839, approves of this case, and in Section 931, says:

"It is possible to conceive a case where changes made by the growth of a city might be so great as to make it impossible to employ steam as a motive power, without endangering the lives of those having a right to use the streets, and it seems to us that, in such a case, the municipal authorities might require the company to use some less dangerous motive power."

In *Municipal Paving Co. v. Donovan*, 142 S. W. 644, the City of Dallas, Texas, by ordinance, prohibited the use of any engines propelled by steam power over any street or highway of the City except those operated on a railway track. The Court of Civil Appeals of Texas sustained the ordinance as clearly within the police power of the city to enact.

The Illinois Court of Appeals in *City of Macomb v. Jones*, 158 Ill. App. 271, sustained a similar ordinance.

In *Hennington v. Georgia*, 163 U. S. 299, this court upheld a statute forbidding the running of freight trains on Sunday, as being a measure for the protection of the health and morals of the State, a police regulation.

In *Baltimore v. Baltimore Trust & Guarantee Co.*, 166 U. S. 673, this court sustained the municipal authorities of Baltimore in directing a street railroad company to maintain but one track through Lexington Street in-

stead of a double track as originally granted to the company, and held that it did not substantially change the terms of the contract, if there was one between the city and the railroad company, as expressed in the original grant, and was no more than the exercise by the city of its acknowledged power to make a reasonable regulation concerning the use of the street by the railroad company, and that the original contract, assuming but not deciding that one existed, was entered into subject to the right of the city to adopt such a regulation, and it must be borne in mind, in the case at bar, that the appellant at the time the case was tried in the lower court was constructing what is known as the Beaverton Cut-off. (See Transcript of Record, testimony of L. R. Fields, p. 98; testimony of J. P. O'Brien, Transcript of Record, p. 110.) Since this case has been tried such cut-off has been fully constructed and it is in operation by the appellant in error, and today it is not operating over Fourth Street any freight trains. While this fact is not in the record of this case, yet I think it will be admitted by the appellant that such is a fact, and that it is obeying the provisions of Ordinance No. 16491 so far as it is made applicable to the operation of freight cars. And it must be further borne in mind, that said ordinance, while it prohibits the use of steam locomotives on Fourth Street, does not, as is claimed by appellant, prohibit the running of its trains, or in any way interfere with the operation of its trains. There is no reason why it cannot use electricity for a motive power. There is no provision of law in force at this time in the City of Portland which in any manner will prevent the appellant from propelling its trains by electricity; therefore, it does not interfere with the operation of said

railroad, nor does such regulation affect any vested or contract rights. So far as the City of Portland is concerned, it has simply said to the appellant, you must not use locomotives along Fourth Street, with which to move your trains, but it has not said that it cannot use any other power. In other words, it has not attempted to prevent the running of trains on, along or over Fourth Street, but has simply legislated against the motive power used to move said trains. But if the appellant still insists that the Council had no authority to enact Ordinance No. 16491, so far as it affects freight cars, we still maintain that under Ordinance No. 599 there is no express stipulation therein that it shall be permitted to use freight cars thereon. The right granted was simply to construct a railroad track and run cars over the same and nothing whatsoever is said about the motive power or the character of the cars. But if this be not true, still, within the provisions of Ordinance No. 599, if the operation of freight cars becomes a nuisance, it may prohibit the running of the same on that particular street, under its police power, which was not contracted away, if the operation of such cars becomes dangerous and detrimental to the public safety. The court below said:

"At the time the city granted to the plaintiff's predecessors in interest authority or permission to occupy Fourth Street for railway purposes the street was an unimproved back street with scattering dwellings along it and no business houses. It is now practically in the heart of the business district and is one of the principal business streets of the city. It is frequented daily by a large number of persons, teams and vehicles constantly traveling

along and across the street during business hours. It is quite steep throughout the business district and the noise, vibration, smoke, cinders and soot from the moving steam locomotives and trains seriously interfere with the transaction of public and private business, and it is a constant source of danger and inconvenience to the public."

Suppose, that in the early history of the City of Washington a railroad company had been granted a franchise, or a right to locate its tracks, upon Pennsylvania Avenue and a further right to run, and operate freight cars thereover, propelled by steam locomotives, and the company claimed that right was in perpetuity, and today, along Pennsylvania Avenue, freight trains were being run propelled by steam locomotives, and the governmental authorities in Washington should decree, by lawful enactment that no locomotives, or freight cars, should be operated on said avenue, would your Honors hold that this was not a reasonable regulation? The foregoing is an apt illustration of the actual situation in the City of Portland.

And, as was said, by this court in *Baltimore v. Baltimore Trust Co.*, supra:

"It granted the use of the streets for double tracks for many miles, and the subsequent limitation of that use to one track related to but a few hundred feet where peculiar and exceptional conditions existed, where the danger to be apprehended from the use of electric cars on double tracks in a narrow and busy thoroughfare was very great, and where it might fairly be decided by the common council that double tracks at that point would be an unreasonable and dangerous use of the street



by the company and directly tend to prevent its reasonable and safe use and enjoyment by the public at large."

The evidence in this case discloses that street car lines cross the track of the appellant at four different places, viz., Glisan, Burnside, Washington and Morrison Streets; that at Fourth and Glisan there are 632 cars crossing per day; at Fourth and Burnside, 645; at Fourth and Washington, 1105, and at Fourth and Morrison, 552, making a total of 2934 street cars in eighteen hours (Transcript of Record, p. 411, testimony of F. Cooper), and it must be borne in mind that this testimony was taken on the 4th day of December, 1909 (three years ago), and the city has grown considerably since that time. This is only one phase of the traffic situation along Fourth Street, and does not take into consideration the number of pedestrians that cross and recross the tracks every day, nor the other moving traffic across the street; and as disclosed in the testimony of Mr. Cooper, when trains are passing, particularly freight trains, all of this traffic is stopped.

The language of Section 3, "That the common council reserves the right to make or to alter regulations at any time as may be deemed proper for the conduct of said road within the limits of the city," is broad and general in its term, and that reserved power is a continuing one, and so long as the object is plainly one of regulation, as said by this court in the Baltimore case, "it may be exercised as and whenever a common council may think proper; the use of the street may be subjected to one condition today and to another and addi-

tional one tomorrow, provided the power is exercised in good faith and the condition imposed is appropriated as a reasonable regulation, and is not imposed arbitrarily or capriciously."

The lower court found that the provisions of the Ordinance No. 16491 were not unreasonable or arbitrary. This conclusion was arrived at after hearing all of the testimony in the case.

Continuing this discussion as to whether or not the Council, by the enactment of Ordinance No. 599, could contract away its police power so as to prevent it from excluding locomotives and freight cars from Fourth Street will say that in the case of Portland Railway, Light and Power Company vs. The City of Portland, just decided by Judges Bean and Wolverton in the District Court of the United States for the District of Oregon, and not yet reported, the legislature of the State of Oregon, under the charters of 1898 and 1903 authorized the granting of franchises to street railway companies, and, in pursuance of this authority, franchises were granted to the said railway company.

Section 112 of the Charter of 1903 provided as follows:

"Every grant of a franchise which provides for the charging of rates, fares and charges shall contain a provision fixing the maximum rate of fares, rates and charges, which the grantee his, its or their successors or assigns can charge or collect for services rendered or performed by virtue of and during the life of such franchise and the operation of his or its plant or property thereunder; and said grant may also or in addition provide that the



Council reserve the right to thereafter from time to time change, alter, regulate and fix fares, rates or charges which the grantee his, its or their successors or assigns, can charge or collect thereunder during the life of such grant or franchise."

One of the franchises No. 19176 contains the following provision:

"Section 12: The Railway Company, its successors and assigns may charge and collect from each passenger traveling upon its railways or street railways for each trip traveled by such passenger in one general direction, wholly within the City of Portland, on the railways or street railways of the Railway Company, its successors and assigns, including railways and street railways constructed on the streets or parts thereof, authorized by Section 1 of this ordinance, a fare of five cents (5c) and no more, except that for passengers traveling in observation cars the railway company may charge and collect from each passenger a fare not exceeding fifty cents (50c) per trip. The Railway Company, its successors and assigns, may charge and collect for the use of funeral cars, mail cars, express cars, party cars and other special cars, a sum not exceeding ten dollars (\$10.00) per hour for each of such cars."

And that "this ordinance and the franchise herein contained is granted subject to all the terms, provisions and conditions contained in the charter of the City of Portland and applicable thereto in the same manner and to the same extent as if each and every said terms, provisions and conditions were expressly set out and incorporated herein." (Section 19.)

And also (the power and right at all times to reasonably regulate in the public interest the exercise of the rights and privileges granted by this franchise shall be and remain vested in the Council of the City of Portland)." (Section 21.)

At the time of the granting of such franchise, the following provisions of the City Charter were in force:

"The Council may, subject to the limitations and conditions contained in this charter, grant for a limited time specific franchises or rights in or to any of the public property or places mentioned in the preceding sections." (Streets, alleys, highways, etc.). "Every such grant shall specifically set forth and define the nature, extent and duration of the franchise or right thereby granted, and no franchise or right shall pass by implication. At all times the power and right reasonably to regulate in the public interest the exercise of the franchise or right so granted shall remain and be vested in the Council, and said power and right cannot be divested or granted." (Section 94.)

"The Council of the City of Portland shall have at all times power to regulate by ordinance, street railroads, tramways and other railroads and the use of tracks and cars, etc." (Section 105.)

"Every grant of a franchise which provides for the changing of rates, fares and charges shall contain a provision fixing the maximum rate of fares, rates and charges which the grantee, his, its or their successors or assigns can charge or collect for services rendered or performed by virtue of and during the life of such franchise and the operation of his or its plant or property thereunder; and said grant may also or in addition provide that the

Council reserve the right to thereafter from time to time, change, alter, regulate and fix fares, rates or charges which the grantee, his, its or their successors or assigns, can charge or collect thereunder during the life of such grant or franchise." (Section 112.)

Thereafter the City attempted to reduce the rate of fare and the company contended that such ordinance was violative of the contract between it and the city and that it was entitled to collect during the life of the franchise a fare of five cents and that in granting the franchise, the acceptance thereof became a vested right and that the city had no power or authority to fix or regulate fares that it might charge during the life of the franchise, namely, twenty-five years. In other words, the city had contracted with the street railway company that it might charge five cents during the life of the franchise and that the City thereby could not reduce the rate even though such reduction might be reasonable.

Judges Bean and Wolverton, in discussing this question, said:

"On the first branch of the case, the questions are (1) had the City of Portland at the time of the passage of Ordinance No. 19176 legislative authority to contract away for the \* \* \* of the franchise the governmental right of fixing fares \* \* \* (2) has it done so? If the first question is answered \* \* \* the negative the other necessarily becomes immaterial, for if the city had no authority to grant the complainant immunity by contract from the right of the state, in the ex-

ercise of its governmental powers, to reasonably fix rates for the carriage of passengers over its line, this court should not assume to inquire whether the state has in fact delegated to the city the power to fix rates. *Mill v. Chicago*, 127 Fed. 731; *New Orleans v. Water Works*, 142 U. S. 79.)

“A large number of decisions have been cited and commented upon by counsel. They have all been carefully examined. It is needless to refer to them in detail for, as said by Mr. Justice Moody in *Telephone Company v. Los Angeles* (211 U. S. 273), ‘No case, unless it is identical in its facts, may serve as a controlling precedent for another.’ It is enough that the authorities are agreed that the right to reasonably regulate rates to be charged by public service corporations is a governmental power, continuing in its nature, and while it may be suspended in a given case by a contract for a definite time, not grossly unreasonable in point of time (*Detroit v. St. Ry.*, 184 U. S. 368; *Vicksburg v. Water Works*, 206 U. S. 496; *Los Angeles v. Water Co.*, 177 U. S. 558; *Minneapolis v. St. St. Ry.*, 215 U. S. 417; *Cleveland v. St. Ry.*, 194 U. S. 517; *Walla Walla v. Water Co.*, 172 U. S. 1) it can only be done by words of positive grant or language equivalent thereto, and then only by the supreme legislative body of the state, unless the authority to do so is clearly delegated by it to some governmental subdivision.

“‘The general powers of a municipality or of any other political subdivision of the state are not sufficient. Specific authority for the purpose is required. This proposition,’ says the Court in *Telephone Company v. Los Angeles*, *supra*, ‘is sustained by all the decisions of this court.’

"It is further said in that case: 'For the very reason that such a contract has the effect of extinguishing *pro tanto* an undoubted power of government, both its existence and the authority to make it must clearly and unmistakeably appear, and all doubts must be resolved in favor of the continuance of the power.'

"Citing a large number of cases: It was consequently held that authority to a municipality to grant a franchise to the highest bidder after public advertisement, stating the character, terms and conditions of the franchise, 'to erect or lay telephone wires \* \* \* upon any public street or highway' and 'to regulate telephone service and the use of telephones \* \* \* to fix and determine the charges for telephones and telephone service and connections' conferred ample authority to exercise the governmental power of regulating charges but not 'authority to enter into a contract to abandon the governmental power itself' notwithstanding a franchise so sold by the city provided that the charge for services should not exceed specified amounts. All the leading decisions bearing on this subject are so thoroughly and carefully reviewed and the distinction between them pointed out by Mr. Justice Moody in the case just referred to that it is unnecessary to prolong this opinion by reference to them. The concrete question before us is whether the City of Portland had authority by its charter, at the time Ordinance No. 19176 was adopted, to contract with a public service corporation as to the fares such corporation might charge and collect during the life of the franchise, so as to deprive itself or the state from exercising during that time the governmental power of rate regulation. Our attention has been called to no express authority to do so. The position of the complain-



ant is that such authority is to be found in the general power to grant franchises for the use of the streets, and in Section 112 of the charter, declaring that every franchise so granted shall fix the maximum rates to be charged during the lifetime thereof. Neither of these provisions contain any express authority to the city to contract away the important governmental power of regulating rates. Authority given a city to grant franchises for the use of its streets may impliedly confer the power to provide therein, as a condition to the exercise of the grant, the rates which it may be lawful for the grantee to charge and collect (152 Mich. 654), but it does not authorize the city to barter or contract away the governmental power of thereafter changing such rates if the altered conditions of the country require. (*Water Co. v. Freeport*, 180 U. S. 587; *Ga. Rd. & Banking Co. v. Smith*, 128 U. S. 174; *Telephone Company v. Los Angeles*, *supra*.) In the *Freeport* case the City Council or Board had authority to provide for a supply of water 'by the construction and regulation of wells, pumps, cisterns, reservoirs or waterworks, and to borrow money therefor, and to authorize any person or private corporation to construct and maintain the same at such rates as may be fixed by ordinance, and for a period not exceeding thirty years.' Under such authority the city granted by ordinance to one Shelton or his assigns, the exclusive right and privilege for the period of thirty years to supply the city and its inhabitants with water, providing therein the rates which the company might charge the city and consumers, and declaring that such ordinance should become a binding contract between the city and Shelton upon his filing an acceptance thereof, and thereafter it should not be altered, amended or changed in any way without the consent of both



parties. Shelton filed his acceptance of the terms and conditions of the ordinance. The city subsequently reduced the rates to be charged by the grantee, and its order was sustained by the Supreme Court on the ground that it had no authority to make an irrevocable contract fixing water rates for the life of the franchise, because such a power was not indispensable to the exercise of the other powers granted. The authority of the city in this case was, it seems to us, fully as complete as can be claimed for the authority of the City of Portland. Moreover, it is expressly declared in the section of the charter of the City of Portland authorizing it to grant, for a limited time, franchises or rights to the use of its streets by public service corporations that 'at all times the power and right reasonably to regulate in the public interest the exercise of the franchise or right so granted shall remain and be vested in the Council and said power and right cannot be divested or granted' and this provision is carried into the complainant's franchise by express words. Here is a positive provision of the charter and franchise that the right to reasonably regulate in the public interest the exercise of the rights granted cannot be and was not granted away. The word 'regulate' is a broad term. It is the word used in the Constitution of the United States to define the powers of Congress over Interstate Commerce, and it is hardly necessary to cite authorities to show that under such power Congress has the right to regulate the charges or rates for the transportation of freight or passengers by interstate carriers. Section 112 of the charter does not in terms or by necessary implication authorize or empower the city to enter into an irrevocable contract with the grantee of a franchise fixing the rates of fares which may be charged by such

grantee. Such a contract is not indispensable or necessary to the exercise of the other powers granted. Moreover, the section must, we think, be read in connection with the other provision in the charter reserving to the city the right and power at all times to reasonably regulate in the public interest the exercise of a franchise granted by it. It is in the nature of a command from the supreme legislative power of the state to the city that it shall, in granting franchises which provide for a charge of fares, insert a provision fixing the maximum charges which the grantee or its assigns may charge or collect for services rendered during the lifetime of the franchise. It is a limitation rather than the grant of a power to contract or barter away the governmental right of regulating fares, (*Home Tel. & Tel. Co. v. Los Angeles*. 155 Fed. 554-573) and the fact that no provision was entered in the franchise reserving to the city the right to change the rate cannot affect its power to do so.

"We conclude that the city had no authority at the time of the adoption of Ordinance No. 19176 to contract away the right of regulating the fares to be charged by the grantee when the public interest required, and therefore the ordinance complained of is not void as impairing the obligations of a contract."

Prohibition of steam power under Ordinance No. 16491 does not prevent appellant from employing electricity as a motive power.

Mr. Booth, in his work on Street Railways (2nd Ed.) Section 68, says:

"It was decided by the Supreme Court of Illinois

that a charter which was silent as to the motive power that might be used, conferred the right to use only that means of propulsion 'which would be most conducive to the best interests and safety of the public having occasion to use the street as a common highway, and which was then in ordinary use in the state.' In that case the city was sustained in prohibiting the use of steam. Since that decision was announced many radical and beneficial changes have been introduced in the mode of propelling cars, and in numerous instances one kind of power has been substituted for another without express legislative sanction for the use of the improved method. While it is undoubtedly true that the legislature, or, in the absence of a prohibitory statute, the local authorities, when such a regulation would not violate vested rights, may lawfully prohibit the use of any system deemed injurious to public interests, it does not follow that a municipality may not permit the adoption of an improved method in general use merely because, at the date of the existing charter, that system was not in common use in the state by which the charter was granted. And, if the statutes are silent on the subject, no good reason is apparent for denying the right of a company, with the consent of the city, to adopt a system which was discovered since the passage of the original ordinance by which its franchise was acquired. These views are believed to be in accord with the policy of municipal action both in the United States and Canada, and to find some support, by analogy at least, in the adjudicated cases. But in a case in New Jersey much seems to have depended on what the Court believed to have been 'within the legislative design' when the act in question was passed, the conclusion of the Court being that while, under the statute, the

council could lawfully permit the use of 'electric or mechanical motors,' it could not permit the use of poles and wires, because the legislature could not have had any knowledge of the use of such appliances."

### **Is Ordinance No. 599 a Franchise in Perpetuity?**

A general statute such as Sections 6841 and 6842 granting a right to railroad companies to locate their tracks on the streets of a municipality is not a franchise in the true sense of that word, but a license. It is not a direct legislative grant of a franchise as contended by counsel. When an ordinance or statute granting a right on a public street does not attach any fixed term of years to its duration, divergent views have arisen as to the effect of the grant and the time during which it can continue. So far as we have been able to ascertain, no rule has been reached which has generally been accepted by the Courts as the true rule.

This Court in *St. Clair County Turnpike Co. v. Illinois*, 96 U. S. 63, affirming 82 Ill. 174, held that a franchise was limited to the duration of a corporate life.

In discussing this question, let it be borne in mind that the Oregon Central Railroad Company, the original grantee under Ordinance No. 599, has been dissolved. (Complaint, Abstract of Record, page 13.)

Where the fee of the street is not vested in the municipality, as is the rule in Oregon, (*Sharkey v. City of Portland*, 58 Or. 353), the view has been adopted in some jurisdictions making the duration of franchises

commensurate with the existence of the public easement, and terminating therewith upon the vacation of the street. This is the rule in Massachusetts. (*New England Tel. & Tel. Co. v. Boston Terminal Co.*, 182 Mass. 397.)

The Supreme Court of Illinois has, by a long line of decisions, placed a limitation upon the terms of franchises which might otherwise be perpetual. According to its view, if the municipalities had granted rights to public service corporations under certain restrictions and conditions to occupy the street with its structures and no time had been fixed when such rights should cease, the right does not exist in perpetuity, but only exists with the life of the franchise itself, and accordingly, where a city was merged with another municipality, an unlimited franchise was terminated, and these views were accepted and applied by this Court. (*Blair v. Chicago*, 201 U. S. 400.)

Another view is that when a grant is made to a corporation whose corporate term is limited and there is no express declaration of perpetuity in the grant or limitation therein, it holds only during the corporate life of the grantee, and this was the view adopted by this Court in the *St. Clair County Turnpike* case.

The Supreme Court of Oregon has never passed upon this question. It has, however, in *Parkhurst v. Capital City Railway Co.*, 23 Or. 471, held that unless a municipality had direct authority, it was not authorized to grant an exclusive franchise. It is conceded and admitted in this case that the City of Portland had no



delegated authority from the legislature to grant franchises.

In *Lake Roland Elev. R. Co. v. Baltimore*, 77 Md. 352, the Maryland Court of Appeals held that the consent to the use of the street by a railway company gives a mere license and not a franchise.

In *the City of Belleville v. Citizens' Horse R. Co.*, 152 Ill. 171, the Illinois Supreme Court also held that the consenting to the use of the street by a railway company was a mere license.

In *Baltimore Trust & Guarantee Co. v. Baltimore*, 64 Fed. 160, the decision of the Circuit Court of the United States in Maryland, but with a division of the Court, directly conflicted with that of the Maryland Court of Appeals, but this Court in *Baltimore v. Baltimore Trust & Guarantee Co.*, 166 U. S. 673, did not, in deciding that case, find it necessary to decide that point.

Mr. Elliott, in his work on *Roads and Streets* (3rd Ed. Vol. 2) Section 1048, says:

"Although a municipality may have power under its general authority over its streets, to grant a street railway company the right to use them, it does not necessarily follow that it has power to grant to any company a monopoly or a perpetual right to use them. In our opinion, the better rule is that its ordinary general powers over its streets will not authorize it to grant a monopoly or a perpetual right." And he cites in support of his text the following cases.



- Louisville City R. Co. v. Louisville, 8 Bush (Ky.) 415;
- Memphis City R. Co. v. Memphis, 4 Cold. Tenn. 406;
- Nash v. Lowry, 37 Minn. 261, 33 N. W. 787;
- Lake Rowland etc. R. Co. v. Mayor, 77 Md. 352, 26 Atl. 510, 20 L. R. A. 126;
- Eichels v. Evansville St. R. Co., 78 Ind. 261, 41 Am. Rep. 561;
- State v. Trenton, 36 N. J. L. 79;
- Birmingham etc., St. R. Co. v. Birmingham St. R. Co., 79 Ala. 465, 58 Am. Rep. 615;
- Montgomery Light etc. Co. v. Citizens' Light etc. Co., 142 Ala. 462, 38 So. 1026;
- Davis v. Mayor, 14 N. Y. 506, 67 Am. Dec. 186n;
- Milhan v. Sharp, 27 N. Y. 611, 84 Am. Dec. 314;
- Denver etc. R. Co. v. Denver City R. Co., 2 Colo. 673;
- City of Boston v. Richardson, 13 Allen (Mass.) 146, 161

See also,

- Detroit Citizens' St. R. Co. v. City of Detroit, 64 Fed. 628, 12 C. C. A. 365, 26 L. R. A. 667, 1 Am. & Eng. R. Cas. (N. S.) 71;
- Altgelt v. City of San Antonio, 81 Tex. 436, 17 S. W. 75, 13 L. R. A. 383n;
- Mayor of Houston v. Houston etc. R. Co., 83 Tex. 548, 19 S. W. 127, 29 Am. St. 678;
- New Orleans etc. R. Co. v. City of New Orleans, 44 La. Ann. 748, 11 So. 77;

Parkhurst v. Capital City R. Co., 23 Ore. 471,  
32 Pac. 304, 7 Lewis' Am. Corp. & R. Rep.  
562, 26 Am. L. Rev. 675;

New Orleans etc. R. Co. v. New Orleans, 44 La.  
Ann. 728, 11 So. 78.

The Supreme Court of Oregon, in *McQuaid v. Portland & V. Ry. Co.* supra, regarded the occupation of a public highway by a railroad company, under the appropriation authorized by the statute in question (§§6841, 6842, L. O. L.), as nothing more than "a kind of sufferance." That the railway corporation is permitted by the statute to appropriate only so much of the highway as may be necessary or convenient; but the use thereof by the public is not abridged, and further says:

"Its occupation of the street is the same as of any other beneficiary of its use, and is subordinate to the authority of those in whom the law vests the management and control of the street."

The Supreme Court of Oregon in *C. & G. Road Co. v. Stevenson*, proceeds upon the theory that the occupancy of a street, or of a county highway, under the provisions of that statute, amounts to nothing more than a mere contract as distinguished from a franchise, and in view of the fact that the City of Portland agreed with the Oregon Central Railroad Company upon the terms of occupancy, but did not agree upon the length of time the contract should run, can it continue only so long as both parties are consenting thereto? Do the facts in this case bring it within the principles announced in *East Ohio Gas Co. v. Akron*, 81 Ohio St. 33,

where it was held that where a railroad company was given the right to occupy a street without any provision as to time, its right to continue the use of the street was terminable at the election of either party and where the Court said:

“Did the granting of this privilege or right and its acceptance constitute an agreement by the gas company that, having entered the city, it should remain there forever if the city should not permit it to withdraw? The logic of the defendant in error would seem to support an affirmative answer to this question. But if the company enters by virtue of the contract and can withdraw only by consent of the city, then the contract lacks mutuality; for we can discover no corresponding stipulation in favor of the company. It is true that the ordinance grants the right to enter and occupy the streets, but in respect to the time when it shall terminate its occupancy and withdraw, the ordinance is silent. May we infer from this silence that the gas company has a perpetual franchise in the streets? We are not now prepared to hold that the company has thus acquired such a perpetual franchise; and we feel quite sure that even the defendant in error, on more mature reflection, would not insist upon such a conclusion. The Court laid it down as the law, in *Wabash R. Co. v. Defiance*, 52 Ohio St. 262, 307, 40 N. E. 89, that: ‘Every grant in derogation of the right of the public in the free and unobstructed use of (53) the streets, or restriction of the control of the proper agencies of the municipal body over them or of the legitimate exercise of their powers in the public interest, will be construed strictly against the grantee, and liberally in favor of the public, and never extended beyond its express terms when not indispensable to

give effect to the grant.' The doctrine, as well as the judgment, in this case was affirmed in *Wabaah R. Co. v. Defiance*, 167 U. S. 88, 17 S. Ct. 748, 42 U. S. (L. Ed.) 87. The same rule of construction was approved and followed in *Blair v. Chicago*, 201 U. S. 400, 26 S. Ct. 427, 50 U. S. (L. Ed.) 801, and in *Cleveland, etc. R. Co.* 204 U. S. 116, 27 S. Ct. 202, 51 U. S. (L. Ed.) 399. It comes then to this, that in the absence of limitations as to time, the termination of the franchise is indefinite and to preserve mutuality in the contract, the franchise can continue only so long as both parties are consenting thereto."

To the same point see *State v. Atl. & N. C. R. Co.*, 53 N. E. 290. It is admitted in this case that the City of Portland at the time of the passage of Ordinance No. 599 had no express authority given it to grant franchises for the construction or operation of railroads on its streets, and we take it to be elementary that in the absence of an express power in the charter of a city, to grant an exclusive franchise or a franchise in perpetuity, it has no such right. Mr. Dillon, in his work on *Corporations* (5th Ed.) Vol. III, Sec. 1265, discusses at length this question, and says:

"No rule has yet been reached which is generally accepted by the Courts."

And as said by Mr. Justice Moody in *Home Tel. & Tel. Co. v. Los Angeles*, 211 U. S. 273:

"No case, unless it is identical in its facts, may serve as a controlling precedent for another."

The Supreme Court of Oregon in the *City of Joseph v. Joseph Water Works Company*, 57 Ore. 586, had be-

fore it this question: The City of Joseph granted to the Joseph Water Works Company the exclusive right and privilege to lay water mains and to supply that town and its inhabitants with water. The ordinance granting this right, however, limited the term of the grant to fifteen years, which expired January 1, 1909. The company, however, continued its water system and on April 12, 1910, commenced to extend its mains in streets not before supplied with water. The city commenced an action to enjoin on the ground that the company had no franchise. The company contended that it had a perpetual franchise, notwithstanding the limitation of fifteen years expressed therein and in discussing this question, the Court said:

"A municipality cannot, at least without statutory authority, grant a perpetual utility franchise. It is said in *Cedar Rapids Water Co. v. Cedar Rapids*, 118 Iowa 234, 241 (91 N. W. 1081, 1084), that 'grants or franchises in perpetuity or for unreasonably long periods of time are generally regarded as against public policy, and, if ever valid, the authority therefor must be found in the constitution or statutes of the state.' See also,

28 Cyc. 655, 875;

Cooley's Const. L. (6th Ed.) 251;

*Citizens' St. Ry. Co. v. Detroit Railway*, 171 U. S. 48 (18 Sup. Ct. 732; 43 L. Ed. 67);

*Brenham v. Water Co.*, 67 Tex. 542 (4 S. W. 143);

*Illinois Trust & Savings Bank v. Arkansas City Water Co.* (C. C.) 67 Fed. 196;

Logansport Ry. Co. v. City of Logansport (C. C.) 114 Fed. 688.

"It is said in *Birmingham & Pratt Mines St. Ry. Co. v. Birmingham St. Ry. Co.* 79 Ala. 472 (58 Am. Rep. 615):

'Judge Cooley adopts the view that a municipal corporation cannot, 'without explicit legislative consent,' permit the construction of a street railway in its streets, and confer on the projectors 'privileges exclusive in their character, and designed to be perpetual in duration.' \* \* \* No reason is perceived why this principle is not entirely sound, and in strict conformity to every rule pertaining to the true functions of municipal corporations. \* \* \* They have no implied power to barter away today, as a monopoly to one, that which, the public necessities of a growing city may require to be reserved, in order that it may be exercised for the public benefit on tomorrow.'

"See also, note to *Huron Waterworks Co. v. City of Huron* (S. D.), 12 Am. R. R. & Corp. Rep. 398; *Westminster Water Co. v. Westminster* (Md.), 64 L. R. A. 630. Thus we see that the town was powerless to grant a perpetual franchise, and it cannot be presumed that it intended to do so. \* \* \* It is a rule of construction that, if the terms of the franchise are doubtful, they are to be construed strictly against the grantee and liberally in favor of the public. What is not unequivocally granted is withheld, and nothing passes by implication, except what is necessary to carry into effect the obvious intent of the grant. 19 Cyc. 1559; Joyce, *Franchises*, Sec 23; *Water, Light & Gas Co. v. Hutchinson*, 207 U. S. 385 (28 Sup. Ct. 135; 52 L. Ed. 257); *Birmingham*



**Pratt Mines St. Ry. Co. v. Birmingham St. Ry Co.,**  
79 Ala. 465 (58 Am. Rep. 615).

"The Dartmouth College case (4 Wheat. 518; 4 L. Ed. 629), cited by defendant, is not in point for the reason that it relates to a franchise created by sovereign power. And we hold that Section 4 fixes the duration of the franchise at fifteen years. If, as defendant contends, the duration of the franchise in terms is perpetual, then, as we have seen, it is void, and is no protection to defendant for the acts complained of here. This was expressly held in *Westminster Water Co. v. Westminster*, 98 Md., 551 (56 Atl. 990; 103 Am. St. Rep. 424), where the contract was unlimited as to time. The Court held that it was a contract in perpetuity, and therefore void; and that the Court cannot make a new contract between the parties for a limited period: *Cedar Rapids Water Co. v. Cedar Rapids*, 118 Iowa 241 (91 N. W. 1081); *Logansport Ry. Co. v. City of Logansport* (C. C.) 114 Fed. 688. A contract which is beyond the power of the city to make is void: *State ex rel v. Minnesota T. Ry. Co.*, 80 Minn. 108 (83 N. W. 32; 50 L. R. A. 656); *Flynn v. Little Falls Electric Water Co.*, 74 Minn. 180 (77 N. W. 38; 78 N. W. 106); *Milhau v. Sharp*, 27 N. Y. 611 (84 Am. Dec. 314)."

In *Logansport Ry. Co. v. City of Logansport*, 114 Fed. 688, the City of Logansport granted to the Logansport Railway Company the right to operate, in that city, a street railway. The ordinance contained this provision:

"That consent, permission and authority be and are hereby given, granted and hereby vested in said Logansport Railway Company, its successors and

assigns, to operate by electricity its cars, carriages and vehicles of any kind and character along, through, on, over and across the streets, and alleys, bridges and highways in the said City of Logansport now existing or that may be hereafter established or constructed as it may from time to time elect, in perpetuity."

The Court, in construing this ordinance, said:

"We are not concerned with the question whether or not the legislature possesses the constitutional power to grant to the cities of this state the authority to confer upon street railway companies the exclusive and perpetual use of such streets of the city as they may from time to time elect to use and occupy. The question in hand is, has the legislature conferred upon the City of Logansport any such power? The fee of the streets in cities in this state resides in the abutting lot owners, and the city possesses only an easement of way in the streets. It does not hold title to the easement as a private property right, which it may alienate at pleasure, as it might alienate property belonging to the city by title unimpressed with a trust. The city holds the easement in the streets in trust not simply for the city alone, but for the benefit and use of all the people of the state. In interpreting the statutes, the Court ought never to lose sight of the fact that in dealing with the use of the streets the common council of a city is acting as a trustee for the benefit and advantage of the public.

"It is manifest from a reading of the above-mentioned statutory provisions that the legislature has not conferred, in explicit and express words, on the City of Logansport, the power to grant to a street railway company either an exclusive or a perpetual

use of its streets for railway purposes. The act of 1861 simply provides that the street railway company shall first obtain the consent of such common council to the location, survey, and construction of its railroad, before the construction of the same shall be commenced. No words of perpetuity are expressly employed. The same is true of the act of 1891. There being no express words of perpetuity in the legislative grant, is such power necessarily to be implied from the language employed? In *Detroit Citizens' St. R. Co. v. Detroit Ry.*, 171 U. S. 48, 18 Sup. Ct. 732, 43 L. Ed. 67, the question for decision was whether the legislature of Michigan had conferred power on the City of Detroit to grant to a street railway company the exclusive use of its streets. The statute provided that:

'All companies or corporations formed for such purposes (the railway purposes mentioned in the act) shall have exclusive right to use and operate any railways constructed, owned or held by them: provided that no company or corporation shall be authorized to construct a railway under this act through the streets of any town or city without the consent of the municipal authorities of such town or city, and under such regulations and upon such terms and conditions as said authorities may from time to time prescribe.'

The Court says:

'It is clear that the statute did not explicitly and directly confer the power on the municipality to grant an exclusive privilege to occupy its streets for railway purposes.'

"And so it must be held here that similar and no broader language employed in the acts of 1861

and 1891 above mentioned does not explicitly and directly confer the power on the common council of the City of Logansport to grant either an exclusive or a perpetual privilege to occupy its streets for railway purposes. The Court further says:

‘There were many reasons which urged to this; reasons which flow from the nature of the municipal trust—even from the nature of the legislative trust—and those which, without the clearest intention explicitly declared, insistently forbid that the future should be committed and bound by the conditions of the present time, and functions delegated for public purposes be paralyzed in their exercise by the existence of exclusive privileges.’

“And how much stronger are the reasons which insistently forbid that the future should be committed and bound in perpetuity by the conditions of the present time, and that functions delegated for public purposes should be forever paralyzed in their exercise? That such powers must be given in language explicit and express, or necessarily to be implied from other powers, is now firmly established.

“The power to grant the use of its streets in perpetuity not having been granted to the City of Logansport in explicit and express words, is it granted by a necessary implication? The Supreme Court, in the above cited case, further says:

“‘Mr. Justice Jackson, in *Grand Rapids E. L. & P. Co. v. Grand Rapids E. E. L. & F. G. Co.* (C. C.) 33 Fed. 659, says \* \* \* ‘that municipal corporations possess and can exercise only such powers as are granted in express words or those necessarily or fairly implied, in or incident to the

powers expressly conferred, or those essential to the declared objects and purposes of the corporation,—not simply convenient, but indispensable.’ The italics are his. This would make ‘necessarily implied’ mean inevitably implied. The Court of Appeals of the Sixth Circuit, by Circuit Judge Lurton, adopts Lord Hardwicke’s explanation, quoted by Lord Eldon in *Wilkinson v. Adam*, 1 Ves. & B. 422, 466, that ‘a necessary implication means not natural necessity, but so strong a probability of intention that an intention contrary to that which is imputed to the testator cannot be supposed.’ If this be more than expressing by circumlocution an inevitable necessity, we need not stop to remark, or, if it mean less, to sanction it, because we think that the statute of Michigan, tested by it, does not confer on the common council of Detroit the power it attempted to exercise in the ordinance of 1862. To refer the right to occupy the streets of any town or city to the consent of its local government was natural enough—would have been natural under any constitution not prohibiting it—and the power to prescribe the terms and regulations of the occupation derive very little, if any breadth, from the expression of it.’

“But assuming that the power ‘to give consent upon such terms and conditions as the common council may see fit,’ found in the act of 1891, does acquire breadth from such expression, surely there is sufficient range for its exercise without extending it so as to embrace the power to grant the use of the streets in perpetuity.”

The Supreme Court, further on, says:

“‘Easements in the public streets for a limited time are different, and have different consequences,

from those given in perpetuity. Those reserved from monopoly are different, and have different consequences, from those fixed in monopoly. Consequently those given in perpetuity and in monopoly must have for their authority explicit permission, or, if inferred from other powers, it is not enough that the authority is convenient to them, but it must be indispensable to them.'

"Can it be successfully contended that the perpetual use of the streets of a city is indispensable to their use for railway purposes? \* \* \* But the grant is open to a more serious objection. It was ultra vires of the common council to surrender its control of the streets of the city in perpetuity to the complainant. The municipal authorities had no power to grant forever to the complainant the right, at its own uncontrolled election, to use and occupy such or all of the streets of the city as it might from time to time elect. The right to determine for itself from time to time what streets could be used and occupied for street railway purposes consistently with the public safety and welfare is a power incapable of absolute alienation by the common council. By these ordinances the common council has undertaken to surrender this power, and to remit it to the uncontrolled election of the complainant. The only power reserved is the power, if the common council wishes the railway to be extended along a particular street, to notify the complainant of such desire; and, if it fails within one year to construct and operate its road on such street, then the use of such street may be granted to another railway company. But no right or power is reserved to prevent the railway company, at its election, from using with a double or single track any and all the streets of the city, however



injurious it may be to the public convenience, safety, or welfare. The public convenience, safety, and welfare, in this regard, are surrendered to the complainant. By these ordinances, if valid, to the complainant's election is relegated the question whether or not a street can, with due regard to the comfort and safety of the people, be occupied by a single or a double track railway. Such a surrender of corporate power in perpetuity to a street railway company cannot and ought not to be upheld. It cannot be supported as a reasonable exercise of the power of a trustee over a trust estate committed to its charge, to be administered in the interest of the public, and not for the private advantage and gain of railway or other corporations."

Counsel for plaintiff in error will rely most strongly upon the recent decision of this Court in *Louisville v. Cumberland Telegraph & Tel. Co.*, 203 U. S. 571. We believe a distinction can be drawn between that case and the case at bar. In the *Louisville* case the telephone company received a franchise direct from the legislature and one of the conditions of the franchise was that it might occupy such streets in the City of Louisville as it desired with the consent of the general council of that city, and the council thereafter, by ordinance, designated certain streets that said company could use, and later on it attempted to repeal the rights of said company. In the case at bar the plaintiff in error has no franchise from the State of Oregon, but simply located its road under a general law which required it to agree with the City of Portland upon the terms and conditions of occupancy. An agreement was made between the company and the city as to the terms of occupancy, with the single exception, however, that

no agreement was made as to how long this right of occupancy should continue, that is, no time was fixed in the agreement and therefore the Louisville case does not apply because in that case the legislature unquestionably had a right to grant a franchise in perpetuity, but in the case at bar the legislature has not granted to the plaintiff in error a perpetual franchise on the streets of the City of Portland, nor any franchise at all, but simply authorized it to construct its tracks upon such streets as the city might designate, nor had the legislature at that time granted to the City of Portland any authority to grant a franchise, nor did it ever grant unto said city authority to grant franchises in perpetuity. The only authority that the legislature did grant was that a railroad company desiring to use any of the streets of a municipal corporation could enter into an agreement with that municipality as to the terms and conditions of occupancy, and it granted the further right to the municipality to make such agreement with the railroad company. Nothing, however, is said in the statute which can, by any method of construction, be held to authorize a municipality to enter into a contract with the railroad company giving it a perpetual right upon any of its streets.

As we view it, the case at bar is easily distinguished from the Louisville case. In the Louisville case the city attempted to take away from the company all of its property. It was not a regulating ordinance in any sense of the word, and if its action had been upheld it would have destroyed the entire business of the company. In the case at bar no such facts exist.

In the Louisville case, as said by this Court, "in considering the duration of such franchise it is necessary to consider that a telephone system cannot be operated without the use of poles, conduits, wires and fixtures," but in the case at bar no reason exists for such a holding, because the appellant can operate its road to the City of Portland. Its railroad is not confiscated as would have been the telephone company's property.

We can conclude the discussion of this phase of the case in the words of Chief Justice Hale, who says:

"Time is the wisest thing under Heaven. It is most certain that time and long experience is much more ingenious, subtle and judicious, than all the wisest and acutest wits, coexisting in the world, can be. It discovers such varieties of emergencies and cases and such inconvenience in things that no man would otherwise have imagined." (Hargraves Law Tracts.)

And in the words of Judge Dillon:

"The value of our system of law, as we now have it, is that it embodies the wisdom of time and experience. It is, perhaps, not too much to say that not until it was sought to use public streets, not only for surface railroads but for elevated and underground railways and other modern uses, did the exact nature of these respective rights come to be thoroughly considered. Good fruit in the law, as in the natural world, is the product alone of patient cultivation. It ripens slowly and can be gathered only at the appointed time. The exact state of the law on this subject in any given state can only be understood by a critical study of its special

constitutional and legislative provisions and line of judicial decisions." (Dillon Mun. Cor. Vol. III, page 20-87.)

It was not until 1898 that the legislature of the State of Oregon attempted to confer upon the City of Portland the express power to grant franchises in its streets to public service corporations. The growth of the State and the cities therein then began, and as a natural consequence, it became apparent that the future would not warrant either the legislature or its agency, the municipality, to grant franchises to these corporations, in perpetuity; that such a course would be detrimental to the interests of the public and it was not until 1903 that a limitation of twenty-five years was provided. It is safe to say that the Council of the City of Portland at the time it enacted Ordinance No. 599 (forty-three years ago), did not have in mind this question. If they had, is it not reasonable to suppose that they would have provided some limitation? Is it reasonable to suppose that those men acting at that time in the best interest of their constituents, the public, would not have provided for some limitation if they could by any possible human intelligence have looked into the future and seen the condition of Fourth Street as it is today? It is evident that they did have in mind, however, that the time would come when it might be dangerous to operate steam locomotives and freight cars over the street, and they provided for such contingency. But is it reasonable to suppose that these men wanted to grant a perpetual franchise in that street to this railroad company? We think not, especially in view of the later legislation upon this subject, that of limiting franchises to twenty-

five years, and providing that the city could take the same over at the expiration thereof and providing for compensation for the use thereof.

But if it should be held that the rights of the appellant, on Fourth Street, are in the nature of a perpetual franchise, can it be said that it has a franchise to perpetually operate freight cars along said street by steam power? Is Ordinance No. 599 construed with Sections 6841 and 6842 (Lord's Ore. Laws), susceptible of such interpretation? Could the Legislature of the State of Oregon perpetually contract its right away to prohibit the operation of a railroad when it became in fact a nuisance? We think not.

#### **INTERFERENCE WITH INTERSTATE COMMERCE.**

Appellant contends that Ordinance No. 16491 is void because it interferes with interstate commerce; but we understand the rule to be that the Courts will enforce all lawful and constitutional regulations and rules intended to safeguard the public by the proper control of corporations, and that each state has the power, never surrendered to the Government of the Union, to guard and promote the public interests, with regard to the police regulations, that do not violate the constitution of the United States, or the constitution of the state, and that all rights are held subject to the police power of the state; and if the public safety or the public morals require the discontinuance of any manufacture or traffic the legislature may provide for its discontinuance, notwithstanding individuals or corporations may thereby suffer inconvenience. And the fact that a cor-

poration is engaged in interstate commerce does not deprive the state of power to exercise reasonable control over its business done wholly within the state. This principle is most elaborately enunciated by this Court in *Smith v. Ala.*, 124 U. S. 465, and local municipal regulation, such as the one now under consideration, is not an interference with interstate commerce. This road does not run outside of the State of Oregon, but is confined wholly within its limits.

The rule is generally recognized that municipal corporations are *prima facie* the sole judges respecting the necessity and reasonableness of their ordinances subject to the supervision of the Courts. The presumption, however, is always in favor of the validity of the action of the municipality, and no ordinance will be set aside if the evidence discloses that it was not enacted arbitrarily and not in the exercise of a reasonable discussion.

Mr. McQuillin, in his new work on *Municipal Corporations*, Vol. II, Sections 731 and 732, says:

"The rule is generally recognized that municipal corporations are *prima facie* the sole judges respecting the necessity and reasonableness of their ordinances, and hence the legal presumption is in their favor, unless the contrary appears on their face or is established by proper evidence. Thus, while an ordinance requiring street railways to run not less than one car every twenty minutes, between certain hours, will be presumed to be reasonable, it may be avoided by proving that the convenience of passengers does not require the running of cars as



specified. In questions of doubt, the Courts are inclined to defer to the discretion and judgment of the municipal authorities.

"The language of the cases is that 'when municipal authorities have adopted an ordinance, before a Court is justified in holding the same to be invalid the unreasonableness or want of necessity of such a measure for the public safety and for the protection of life and property must be clearly made to appear. It should be manifest that the discretion interposed by the municipal authorities has been abused;' and that 'to arrive at a correct decision whether the by-law be reasonable or not, regard must be had to its object and necessity. Minute regulations are required in a great city which would be absurd in the country.'

"Accordingly, in determining the question, the Court will have to regard all the circumstances of the particular city or corporation, the object sought to be obtained, and the necessity which exists for the ordinance. Implied power springs from necessity. That which may be necessary for a large city, may not be necessary for a small city or borough. That which is not necessary cannot be implied.

"Likewise, a reasonable regulation, intended to operate in a densely populated part of a city, might be unreasonable as applied to parts of the same city sparsely populated. Therefore all of the surrounding conditions must be carefully considered. It is thus manifest that, as a rule, the municipal authorities are more competent to pass on such questions than judicial tribunals. In recognition of this fact, the rule is of universal application that a clear case should be made out to authorize the Court to interfere with the exercise of the police powers of a

municipal corporation on the ground of unreasonableness.

“If there is no substantial connection between the assumed purpose of an ordinance and the end to be accomplished, it is unenforceable. So to be reasonable, the ordinance must tend in some degree to the accomplishment of the object for which the corporation was created and its powers conferred.

“In viewing its reasonableness the ordinance must be judged by its purport and effect, and not by the motives or intentions of individual law-makers who participated in its enactment. The rule usually applied is that ‘Courts will not look into the motives of a legislative body in the exercise of its legislative powers, except in extraordinary cases where public policy imperatively demands it on the ground of palpable fraud.’ ”

In *Union Oil Co. v. City of Portland*, 198 Fed. 441, the City of Portland enacted an ordinance restricting the location of oil tanks within certain districts. After such ordinance had been enforced a very short time it was repealed, but in the interim the plaintiff, the Union Oil Company, purchased property, and secured a permit from the city authorities to construct an oil plant in conformity with the provisions of the ordinance. Thereafter the council repealed the first ordinance and enacted another ordinance, the effect of which was to prevent the Union Oil Company from constructing its tanks upon land it had bought for that purpose. A suit was commenced in the Federal Court and it was contended that the last ordinance deprived said company of its property without due process of law, and that council

acted arbitrarily in enacting the later ordinance. The Court said:

"By its charter the city is given authority to regulate or prohibit the storage, manufacture or sale of oil within the city limits. Section 73, subd. 36. The storage of fuel oil and its products is therefore within the police power of the city, and a proper subject for municipal regulation or prohibition. The determination of the city as to what is a proper exercise of its powers in this respect is, of course, not final or conclusive, but is subject to the supervision of the Courts and will be disregarded when there has been an arbitrary and unwarranted interference with constitutional rights. *Dobbins v. Los Angeles*, 195 U. S. 223, 25 Sup. Ct. 18, 49 L. Ed. 169. The presumption, however, is in favor of the validity of the action of the council. The only question the Courts will consider is whether the means adopted are reasonably adequate to the accomplishment of the purpose, or whether the police power has been used for the protection of the public, or for the mere spoliation and destruction of private property and rights; in short, whether the municipal authorities, under the guise of protecting the public interests, have arbitrarily interfered with private business, or imposed undue or unnecessary restrictions upon lawful occupations. As said by Mr. Justice Brown in *Holden v. Hardy*, 169 U. S. 366-398, 18 Sup. Ct. 383 (42 L. Ed. 780):

" 'The question in each case is whether the legislature has adopted the statute in exercise of a reasonable discretion, or whether its action be a mere excuse for an unjust discrimination, or the oppression or spoliation of a particular class.' "

Now, the evidence in this case does not show that the

council, in repealing the districting ordinance, acted arbitrarily and not in the exercise of a reasonable discretion. On a reconsideration, it found that the ordinance was adopted without full information as to the facts, and that it was a mistake, and hence corrected the error by repealing it. The contemplated construction of complainant's plant was no doubt the immediate cause of repeal; but it was not done to oppress or discriminate against the complainant, but for what the council deemed the public welfare. By the passage of the ordinance the council did not exhaust or bargain away the police powers of the city or deprive itself of the right to repeal such ordinance if, in its judgment, the public interest required. Nor was it estopped from doing so because the complainant had taken up an option previously acquired and expended money in making preparations for the erection of its plant within the territory described therein. The right to exercise the police power is a continuing one, and private property and business is always subject to a legal exercise thereof. *Portland v. Cook*, 48 Or. 550, 87 Pac. 772, 9 L. R. A. (N. S.) 733; *City of Portland v. Meyer*, 32 Or. 368, 52 Pac. 21, 67 Am. St. Rep. 538.

### REVIEW OF EVIDENCE.

At the time of the enactment of Ordinance No. 599, January 6, 1869, the testimony in this case discloses that the population of the City of Portland was 7980. The population of the City of Portland according to the last official census was 208,000, but today it may be safely said to be 250,000.

Mr. Himes, a witness for the defendant in error in said case, and holding the position of Assistant Secretary to the Oregon Historical Society, testified that he had lived in Portland since March 13, 1864. That the condition of Fourth Street in 1869 was such that only wooden buildings were erected on the street; that the street was sparsely built up, no business buildings whatsoever on the street; that it was an earth street; no sewers and no water mains except wooden pipes. That he was twenty years of age at that time. That he remembered the first type of trains and engines that run over the road. That they were very small; that trains only ran occasionally; that there was only one train running back and forth in a day; that Fourth Street was away from the thickly settled part of the City; that the character and amount of travel on Fourth Street at that time was small; that it was impossible to haul heavy loads over it as there was no pavement. That the sidewalk consisted of two boards running length wise. That today, he has an office in the present City Hall; that the vibration from the trains that now operate on Fourth Street is felt; the jar is very distinct. That his office is some fifty feet back from the street; that the noise from the operation of the trains is annoying and it is difficult at times to carry on a conversation when the train passes.

That the City Council was justified in enacting Ordinance No. 16491 is borne out by the testimony of John B. Cleland, who testified, substantially, that he was a judge of the Circuit Court since January, 1898, holding court in the Court House, facing Fourth Street, constantly in various Court rooms; that the effect of the

passage of locomotives and freight cars along Fourth Street was to suspend hearings in the Court room during such passage; this occurred two or three times in the morning and two or three times in the afternoon.

(Transcript of Record, page 393.)

Mr. Barbur, Auditor of the City of Portland, substantially testified that since July, 1907, he had been Auditor; that he was personally present at meetings in the Council Chamber in the City Hall, which faces Fourth Street; that all business was suspended during the passage of trains; that there was considerable vibration felt in the City Hall when trains passed.

(Transcript of Record, page 395.)

Mr. Kruse, proprietor of a large hotel facing Fourth Street, substantially testified that the effect of the operation of steam locomotives, on his business, was to suspend business; telephones could not be used by guests on account of the rumbling noise from the train; that considerable dust and cinders and a great deal of smoke came in the hotel; that in the public dining room transoms had to be closed.

(Transcript of Record, page 396.)

Ben Selling, a merchant having a large place of business on Fourth Street, substantially testified that he was State Senator for Oregon—lived there forty years; that the effect of the operation of steam locomotives and freight cars was that the building shook, smoke caused inconvenience and the noise made it difficult to carry on conversation with customers; that jar from trains



caused a great many electric lights to be broken in his store.

(Transcript of Record, page 400.)

Mr. Henry, owner of a large office building facing Fourth Street, testified, substantially, that he had lived in Portland twenty years; that the effect of the operation of trains on said street was that many people objected to becoming tenants in his building on account of said railroad; that property is less valuable on Fourth Street on account of the operation of steam locomotives and freight cars on said street; that property was from ten to twenty per cent. higher on other streets; that all business and telephone conversations are suspended during the passage of trains.

(Transcript of Record, page 403.)

Father I. M. Vasta, pastor of the Italian Church, testified, substantially, that the church is located on said street; that services are constantly interrupted by the passage of trains—impossible to hear what is said; that it is a source of annoyance to children going to St. Mary's Academy, also located on said street; that the building shakes, and that the smoke dirties the building.

(Transcript of Record, page 414.)

Mr. D. T. Hunt, a resident on the street, testified that the vibration of the train affects his residence to such an extent that gas fixtures are loosened, and that gas mantels are destroyed.

(Transcript of Record, page 416.)

Mr. R. M. Gray, who operates a large store facing on

said street, testified that he had been in business on the street five years; that during the passage of the trains on Fourth Street it was impossible to use the telephone; that they have in connection with their business a ladies' department; that there are a great many telephone calls coming into that department, and that it is absolutely impossible to use the telephone during the passage of trains; that store is equipped with expensive lighting arrangement—has 200 Tungsten lamps, and that these lamps are constantly breaking; that the jar from the operation of trains on the street is the cause of this breakage; that the breakage costs him about Twenty-five Dollars a month; that the noise is such that it is difficult to carry on a conversation; that the operation of the train interferes with the proper transaction of business with customers; that all of the big freight trains frequently have two engines on both ends, and that there are several trains a day.

(Transcript of Record, page 347.)

Harvey O'Bryan, an insurance agent in the City, testified as follows:

“Q. Mr. O'Bryan, how long have you lived in Portland?

A. 22 years.

Q. What is your business?

A. Insurance.

Q. How long have you been in that business?

A. Sixteen years.

Q. Fire insurance?

A. Yes, fire insurance.

Q. I will ask you, Mr. O'Bryan, whether you have examined and whether you are acquainted with the buildings on Fourth Street from its northern extension up through the City of Portland.

A. Yes, I am quite familiar with them, having insurance on almost all of them, scattered along, and from making inspections at various times.

Q. I will ask you whether you made any special investigation before this trial.

A. Yes, I have maps which I have checked over and made a rough key of the blocks, and have inspected the buildings to verify the same.

Q. Have you made a list of the buildings and the dimensions?

A. Yes.

Q. Who they are occupied by?

A. Yes, sir.

Q. And the character of the business on Fourth Street?

A. Yes, sir.

Q. Have you that with you?

A. Yes, sir.

(The following was accepted as the direct examination of Mr. O'Bryan.)

**Between Terminal Yard and Glisan Street.****West Side:**

Three and 2-story frame building, 100x100 feet, occupied by Wadhams & Kerr Brothers' Wholesale Grocery House.

**Between Hoyt and Glisan Streets.****West Side:**

Four-story brick, 200x100 feet, occupied by the Union Meat Company.

**East Side:**

One and 3-story frame buildings, adjoining and communicating, 200 feet x 75 and 100 feet; occupied as machinery plant, warehouse and laundry.

**Between Glisan and Flanders Streets.****West Side:**

At the Southwest corner of Fourth and Glisan Streets, a 3-story brick, 50x100 feet, occupied by the Pacific Coast Construction Company warehouse.

Northwest corner of Fourth and Flanders Streets, 3-story brick, Chinese occupancy, 200x100 feet.

**East Side:**

Southeast corner of Glisan and Fourth Streets, two brick buildings, One 3-story, 50x50, occupied———; 2-story buildings, occupied as candy factory and soap factory, building 50x100 feet.

Northeast corner of Glisan and Flanders Streets, one

and 2-story brick and frame building, occupied by Ben Trenkman & Co., sheet iron works.

**Between Flanders and Everett Streets.**

**West Side:**

Three-story brick, 200x100 feet, all Chinese occupancy.

**East Side:**

Northeast corner of Fourth and Everett Streets, frame building 50x100 feet, saloon and lodgings. From Flanders Street South 150 feet are four 1 and 2-story frame buildings, occupied by saloon and lodgings.

**Between Everett and Davis Streets.**

**West Side:**

Southwest corner of Everett and Fourth Streets, 100 x100 feet, seven 1 and 2-story frame buildings, occupied as saloons and lodgings.

Northwest corner of Fourth and Davis Streets, 3-story brick, 100x100, occupied as general storage.

**East Side:**

Between Everett Street and Davis Street are four 2-story frame buildings, average size of 50x75 feet, occupied as saloons, stores and lodgings.

**Between Davis and Couch Streets.**

**West Side:**

In this block are 200 feet by an average of 100 feet in depth of 2 and 1-story frame buildings occupied as

saloons, Japanese stores, and blacksmith and cabinet shops.

**East Side:**

Southeast corner of Fourth and Davis Streets, 3-story frame building running 200 feet East and West, and 100 feet North and South; stores, saloons, restaurants, etc., on ground floor, lodgings in second and third floors. Building known as Paris House.

On Northeast corner of Fourth and Couch Streets are various frame buildings, one to 2-story in height, all occupying 100x100, with stores, saloons, Chinese and Japanese as tenants.

**Between Couch and Burnside Streets.**

**West Side:**

On Southwest corner of Couch and Fourth Streets is the Overland Hotel, 4-stories, 100x100 feet. On the Northwest corner of Fourth and Burnside, is a 3-story concrete hotel building, with stores on first floor, running 200 feet East and West and fifty feet North and South,

**East Side:**

On the Southwest corner of Couch and Fourth Streets is a two-story brick building, known as Strayer Machine, 50x100 feet.

On the Northeast corner of Fourth and Burnside Streets, covering an area of 100x100 feet, are various buildings, two and one stories high, occupied as saloons, lodgings above, Japanese and Chinese stores.



**Between Burnside and Ankeny Streets.**

**West Side:**

On the Southwest corner of Fourth and Burnside Streets is a 2-story brick, 50x100 feet, known as the Men's Resort.

On the Northwest corner of Fourth and Ankeny is 7-story brick building, 100x100 feet, occupied by the Pacific Paper Company.

**East Side:**

On the 200x100 feet are various two and three story combination frame and brick buildings, occupied as saloons, lodgings, Chinese laundries, candy stores and lodgings.

**Between Ankeny and Pine Streets.**

**West Side:**

Southwest corner of Fourth and Ankeny is a 6-story brick building, 130x100 feet, occupied by Blake-McFall, Wholesale Paper house. (Now under construction.)

On the Northwest corner of Fourth and Pine Streets is a 7-story brick running 200 feet East and West and 75 feet North and South, occupied by Marshall-Wells Hardware Company.

**East Side:**

On the Southeast corner of Fourth and Ash Streets are two and three story frame buildings, occupied as blacksmith shop and lodgings. In the middle of the block is a 2-story brick building 175x40 feet, occupied

as stores on the ground floor, and lodgings on the second floor. In the center of the block is a circular building, 100 feet in diameter, 37 feet high, formerly occupied as the Battle of Gettysburg; now Brunswick-Balke.

#### **Between Pine and Oak Streets.**

##### **West Side:**

Southwest corner of Fourth and Pine and Northwest corner of Fourth and Oak is a 7-story Weinhardt Building, occupied by Wadhams & Company, M. Seller & Company and the Goodyear Rubber Co.

##### **East Side:**

Southeast corner of Fourth and Pine Streets is a 4-story frame building, 50x50 feet, occupied by Chinese, and a 2-story frame store building, 25x35 feet, also Chinese occupancy.

Northwest corner of Fourth and Oak Streets, is a 9-story Lewis building, concrete; under construction; 50x100 feet; 2-story frame building North adjoining.

#### **Between Oak and Stark Streets.**

##### **West Side:**

Southwest corner is a 6-story office building, 100 feet square, known as the Henry Building. Northwest corner of Fourth and Stark is 100x100 feet of 1 and 2-story frame buildings, occupied as stores, saloons, etc.

##### **East Side:**

Southeast corner of Fourth and Oak Streets is 11-story concrete Board of Trade Building.

Northeast corner of Fourth and Stark Streets is the 8-story stone and brick Chamber of Commerce Building.

### **Stark and Washington Streets.**

#### **West Side:**

Southwest corner of Fourth and Stark Streets is a 2-story brick building, occupied by Pantages Theatre Building, with 2-story frame building South adjoining.

Northwest corner of Fourth and Washington Streets is a 7-story steel building, known as the Rothchild Building, 50x100 feet; North adjoining is the 8-story concrete building known as the Couch Building.

#### **East Side:**

Southeast corner of Fourth and Stark Streets is a 2-story brick building running 200 feet East and West, and 50 feet North and South; South adjoining is a 3-story brick, 50x100 feet. Stores on first floor, lodgings above.

Northeast corner of Fourth and Washington Streets is a 2-story frame 50x100 feet, occupied by stores on ground floor, lodgings above; adjoining is a 3-story brick, 50x100 feet, occupied by Blumauer-Hoch.

### **Between Washington and Alder Streets.**

#### **West Side:**

Southwest corner, 5-story brick building, known as the Macleay Building, 50x100 feet, stores and offices; South, adjoining is a 4-story brick 75x100, occupied by Woodard-Clarke.

Northwest corner of Fourth and Alder Streets, various 2 and 3-story frame buildings, covering an area of 75x100 feet, occupied as saloons, stores and lodgings.

**East Side:**

Southeast corner of Fourth and Washington Streets, 2 5-story buildings, known as the Washington Building, 50x100 feet, occupied by stores and offices; adjoining South 3-story brick, occupied by Lipman & Wolfe, 100x75 feet.

Northeast corner of Fourth and Alder Streets, a 4-story brick building 100x100 feet, known as Hotel Belvedere.

**Between Alder and Morrison Streets.**

**West Side:**

Southwest corner of Fourth and Alder Streets, 4-story brick 100x100, occupied by Honeyman Hardware Company; South adjoining 2-story frame building, 50x100 occupied by Mace.

Northwest corner of Fourth and Morrison Streets, 3-story brick, 50x100 feet, occupied by stores and offices.

**East Side:**

The Southeast corner of Fourth and Alder Streets, a 5-story brick, known as Hoenstoffer Stores, 50x100 feet, stores and offices; South adjoining a 4-story brick building, 50x100, stores and offices. The Northeast corner of Fourth and Morrison Streets, a 3-story brick 100x100 feet, stores and offices. R. M. Gray.

### **Between Morrison and Yamhill Streets.**

#### **West Side:**

Southwest corner of Fourth and Morrison Streets, a 2-story brick, occupied by Steinbach on ground floor, offices upstairs.

Northwest corner of Fourth and Yamhill Streets,  $4\frac{1}{2}$  story building, formerly occupied by the Y. M. C. A., now stores and offices, area 100x75 feet; North adjoining is  $4\frac{1}{2}$  story brick stores and offices.

#### **East Side:**

Southeast corner of Fourth and Morrison Streets, a 3-story brick, 100x100, Ben Selling and others on ground floor; offices and lodgings above; South adjoining is a 2-story brick, 50x100 feet, Portland Fire Department No. 1.

Northeast corner of Fourth and Yamhill, a 2 and 3-story frame, 50x100 feet, saloons and stores on the ground floor and Turner Hall above.

### **Between Yamhill and Taylor Streets.**

#### **West Side:**

Southwest corner of Fourth and Yamhill Streets, 100x100 feet, 1 and 2-story frame buildings, occupied as stores below, lodgings above.

Northwest corner of Fourth and Taylor Streets, 100x100, are four frame buildings 1 and 2-stories high, one brick 1-story high, occupied as saloons, stores, black-smith shops, etc.



**East Side:**

Southeast corner of Fourth and Yamhill Streets, 100x75 feet, are one and 2-story frame buildings, occupied as stores; South adjoining, 50x100 feet, is a 4-story brick building, occupied by Winslow Rubber Company.

Northeast corner of Fourth and Taylor Streets are two frame buildings and one 1-story brick building, occupied by saloons and stores; 50x100.

**Between Taylor and Salmon Streets.****West Side:**

Southwest corner of Fourth and Taylor Streets, on an area of 100x100 feet, are four frame buildings 1 and 2-story; South adjoining, 50x100 feet is 2½ story frame building, stores on ground floor, lodgings above.

Northwest corner Fourth and Salmon Streets, a 4-story combination brick and frame store building, 50x100 feet.

**East Side:**

On entire half block 200 feet North and 100 East and West are the various 1 and 2-story brick and frame buildings occupied as stores, saloons, on ground floor, lodgings above.

**Between Salmon and Main Streets.****West Side:**

County Court House, 2-story and basement brick building.



**East Side:****Plaza.****Between Main and Madison Streets.****West Side:**

Southwest corner a 3-story Boarding House, 50x50 feet.

Northwest corner of Fourth and Madison Streets are two dwellings and one 1-story store building, all frame.

**East Side:****Plaza.****Between Madison and Jefferson Streets.****West Side:**

City Hall, being a 4-story and basement stone and brick building.

**East Side:**

Southeast corner of Fourth and Madison Streets, 50x100 feet, 2-story brick building, occupied as hotel; South adjoining, 2-story livery stable, 50x100 feet.

Northeast corner of Fourth and Jefferson Streets, on an area of 100x100 feet, four 2-story frame dwellings.

**Between Jefferson and Columbia Streets.****West Side:**

Southwest corner are two double dwellings, 2-stories high, each 50x50 feet.

On the Northwest corner is a 1 and 2-story lumber shed, 100x100 feet.

**East Side:**

On this half block are eight frame 1 and 2-story dwellings.

**Between Columbia and Clay Streets.**

**West Side:**

On the Southwest corner of Fourth and Columbia Streets are various 1-story frame buildings, occupied as tin-shop and marble works.

**East Side:**

On this half block are nine 1 and 2-story frame dwellings.

**Between Clay and Market Streets.**

**West Side:**

On the Southwest corner of Fourth and Clay Streets are five 2-story frame dwellings.

Northwest corner of Fourth and Market Streets is a lumber yard, occupying 100x100 feet.

**East Side:**

Southeast corner of Fourth and Clay Streets; on this 100 feet are five 1 and 2-story frame buildings.

Northeast corner of Fourth and Market Streets. On the corner is a 2-story frame lodging house, 90x75 feet; in rear is a 2-story brick hotel building.

**Between Market and Mill Streets.****West Side:**

St. Mary's Academy. Two 2-story frame buildings, one  $3\frac{1}{2}$  story brick adjoining and communicating.

**East Side:**

Southeast corner of Fourth and Market are five 1 and 2 story frame dwellings.

Northeast corner of Fourth and Mill Streets is a 2-story German Baptist Church, two and  $1\frac{1}{2}$  story dwellings adjoining.

**Between Mill and Montgomery Streets.****West Side:**

The Southwest corner of Fourth and Mill Streets is a 4-story brick, St. Michael's Church.

On the Northwest corner of Fourth and Montgomery Streets are three 1 and 2-story frame dwellings.

**East Side:**

On the Southeast corner of Fourth and Mill Streets are three  $1\frac{1}{2}$  story dwellings and one 2-story double flat.

Northeast corner of Fourth and Montgomery Streets, two 2-story frame building, Truck and Engine No. 4, latter being 50x100 feet.

**Between Montgomery and Harrison Streets.****West Side:**

Southwest corner of Fourth and Montgomery Streets

are two 2½-story frame flats; 2-story frame building in rear.

Northwest corner, 1½-story frame dwelling.

East Side:

On this half block are three double 2-story frame flats and three 2-story frame dwellings.

**Between Harrison and Hall Streets.**

West Side:

On this half block are two 2-story frame dwellings, and a 2½-story frame dwelling.

East Side:

On this half block are seven 2-story frame dwellings.

**Between Hall and College Streets.**

West Side:

In the center of the block, a 2-story dwelling.

East Side:

On this block are four 1-story frame dwellings and four 2-story frame dwellings.

**Between College and Lincoln Streets.**

West Side:

There is a double block 400 feet long, on which are 11 1-story frame dwellings and three 2-story frame dwellings.

**East Side:**

Also a double block, on which are two 2-story double flats and six 1 and 2-story frame dwellings.

**Between Lincoln and Grant Streets.****West Side:**

On this block are five one and 2-story frame dwellings.

**East Side:**

On this half block are five 1 and 2-story frame dwellings.

**Between Grant and Sherman Streets.****West Side:**

On this half block are five 1-story frame dwellings, and one 2-story store building 25x80 feet.

**East Side:**

On this half block are six 1 and 2-story frame dwellings, one 1-story building used as a carpet-cleaning establishment and one 2-story frame grocery and meat store.

**Between Sherman and Caruthers Streets.****West Side:**

On this half block are eight 1 and 2-story frame dwellings.

**East Side:**

On this half block are four 1 and 2-story frame dwellings.



**Between Caruthers and Sheridan Streets.****West Side:**

On this half block are six one and 2-story frame dwellings, one 2½ story frame flat building and one 1-story store building, occupied as a grocery.

**East Side:**

On this half block are four 1 and 2-story frame dwellings and one 1-story double dwelling; 2-story frame store building, occupied as butcher and grocery store, the latter being 50x50 feet.

**Between Sheridan and Baker Streets.****West Side:**

The Southwest corner of Fourth and Sheridan Streets, 2-story frame store building, 50x50 feet, occupied as saloons and stores on ground floor; lodgings above. Also seven 1-story dwellings.

J. W. Curran testified that he lived on Fourth Street and that he had resided there twenty-five years, and, in answer to the question of whether or not the operation of the railroad on Fourth Street causes any discomfort and annoyance, said: "Oh, fearful, yes, sir,—very much. You cannot leave windows up at all. The bedding or the bed-clothes, the floors and carpets and nothing that is not covered with soot all the time, especially if the wind is blowing in that direction. I have been irritated and annoyed in different ways by my wife and daughter saying, 'Oh, what will we do with this thing going on.' 'When will we get rid of



this nuisance?' If you throw the windows up to air the house and happen to forget, if you hear the train you go at once, knowing the result; but if you forget, the place is covered with soot all the time. It would make anybody—." That globe after globe of gas fixtures had been destroyed by the vibration. Transcript of Record, page 326.

A. S. Brassfield stated that he had been for twenty-one years bookkeeper for A. B. Steinbach, who maintains a large gents furnishing store facing on said street. That in answer to the question of what the effect of the operation of steam locomotives and trains was on said business, said that the vibration of the trains affected the prisms set in the sidewalk to reflect light in the basement. That a customer being waited on by a salesman invariably has to stop conversation until the train passes. That it was impossible for them to use the new style Tungsten lights owing to the jar from the trains. That the windows are hard to keep clean on account of the smoke leaving a greasy effect thereon. Transcript of Record, page 388.

This is only a partial statement of the evidence, but in our opinion it is sufficient to show that ordinance No. 16491 was not an arbitrary exercise of the police power.

#### **COMMENT ON PROPOSITIONS ADVANCED BY COUNSEL FOR APPELLANT.**

Opposing counsel contend on page 71 of their brief that the ordinance is unreasonable because it prohibits the movement of freight trains and engines, and does

not offer any substitute motive power or confer any right upon the company to prosecute its business in any way upon said street; that the ordinance is not a regulation or limitation of the time or times when steam locomotives and freight trains may be prohibited.

Our answer to this contention is that the City has fixed a limitation of time when steam locomotives and freight trains might be operated on the street, namely, a year and a half from the approval of the ordinance.

As to motive power, the council prohibited only steam engines, leaving it to the railroad company to adopt electricity, gasoline or any other available power for its passenger trains, and a year and a half was provided for making the change so as to give the railroad company time to arrange for the new motive power, and for handling its freight in some other manner, either by erecting a freight depot in the southerly portion of the city or by making a connection with its East Side line (as the company then proposed doing, and has since in fact completed) and routing its freight that way.

Counsel complain on page 72 of their brief that Ordinance No. 16491 provides for a forfeiture and removal of the railroad in case of a violation of the ordinance.

In answer to this contention, we have only to refer to Section 5 of Ordinance No. 599, where it is provided as one of the conditions attached to the consent which the City gave in 1869, to use the street, that any refusal or neglect of the company to "comply with the provisions and requirements of this ordinance, or any other

ordinance passed in pursuance hereof shall be deemed a forfeiture of the rights and privileges herein granted." And it is further provided by Section 3 that the Council "reserve the right to make or alter regulations at any time as they may deem proper for the conduct of the said road within the limits of the City \* \* \* and may restrict or prohibit the running of locomotives at such time, and in such manner as they may deem necessary."

It is apparent from these provisions that Counsels' objections apply not to Ordinance No. 16491, but to Ordinance No. 599 for it is Ordinance No. 599 which reserves the right to make further regulations and provides for a forfeiture in case of the violation of such regulations.

It is elementary that the railroad company cannot accept the beneficial portions of Ordinance No. 599, and repudiate those portions of the ordinance which were inserted for the protection of the City and the public.

On pages 74 to 77 of Counsels' brief, it is contended that Sections 6841 and 6842 of Lord's Oregon Laws gave the company the absolute right to locate and operate their railroad on Fourth Street, and that Ordinance No. 599 is of no effect.

The Court will see that such is not the case because Section 6842 provides that the railroad company shall locate its road upon such particular street as the local authorities shall designate, and if such authorities fail or refuse to designate the street within a reasonable time, such corporation may make such appropriation without reference thereto. The words "such appropria-

tion" refer to Section 6841 where it is provided that when it is necessary or convenient in the location of any railroad to appropriate any part of any public road or street, the County Court may, unless the same be within a municipal corporation, agree with the railroad company upon the extent, terms and conditions of the appropriation of said road or street, and if they are unable to agree, then the company may appropriate so much thereof as may be necessary and convenient in the location and construction of such railroad.

These sections must be construed most strongly against the railroad company for in such cases, nothing is presumed to be granted except what is stated in clear and exact language. Any doubt or ambiguity must be resolved against the company.

19 Cyc. 1459;

Fertilizing Co. v. Hyde Park, 97 U. S. 659, 666;

O. R. & N. Co. v. Ore. Ry. Co., 130 U. S. 1, 26;

Mayor v. Farmers L. & T. Co., 143 Fed. 67, 71;

City v. Helena Water Works, 122 Fed. 1, 14;

Ore. v. Portland General Electric Co., 52 Ore. 343;

Joseph v. Joseph Water Co., 57 Ore. 586.

Keeping in mind the above principle of statutory construction, it is apparent that the railroad company had no right to construct its road upon Fourth Street except in the event of neglect or refusal of the City to designate what street the road should be located upon, and a showing that it was necessary and convenient to locate the road upon that street. Was that done? On

the contrary, it appears that the local authorities did designate the street, as is shown by Ordinance No. 599. The Council attached certain conditions to its consent, and this was proper as is shown by the citation from Judge Dillon on page 78 of Counsels' brief where it is said: "Although the statute or constitutional provision may simply require the consent of the municipality, it is usual to give that consent in the form of an ordinance containing stipulations and conditions, and such ordinance with its stipulations and conditions becomes a part of the contract under which the right to use the street arises."

It is therefore clear that although Section 6842 of Lord's Oregon Laws enables the railroad company to acquire the right to use some street in the City, the railroad company could not acquire that right except by complying with the terms of this statute, one of which terms was to submit to a designation by the City of the street which the railroad company might use. The City designated the street and attached to such designation certain conditions which it was warranted in doing and which the company accepted, and is bound to observe. The railroad company, therefore, cannot say that the condition relative to a forfeiture is not effective.

Counsel for the railroad company on page 99 of their brief contend that the City has no power to repeal, amend or modify Ordinance No. 599, and Section 6842 of Lord's Oregon Laws. We have already shown that by the present charter, the City has, within its limits, all of the police powers of the State, and that Ordinance No. 16491 was enacted pursuant to this power.



Counsel on page 105 of their brief contend that the Oregon Central Railroad Co. was empowered to assign the rights acquired under Ordinance No. 599 and Section 6842 of Lord's Oregon Laws. In our opinion, we have already shown that Ordinance No. 16491 is valid. It is therefore unnecessary to consider the question as to the assignability of the Oregon Central Railroad Company's rights. We will, however, attempt briefly to answer opposing counsel on this subject.

The law is settled in this state that where a right in the nature of a franchise is granted by legislative authority, which right is given for a public purpose, and the public is interested in its exercise, the same cannot be assigned without legislative authority.

In *Oregon v. P. G. E. Co.*, 52 Ore., at page 521, the Supreme Court of Oregon said:

"Again, as to the power of the first company to transfer its franchise, the grant was made to the first company with no power to transfer. Without such authority a transfer is void, and does not relieve the franchise of any of the burdens imposed by the act of its creation. These burdens are a charge upon the franchise, not upon the land as such, and may be enforced against the person or corporation exercising it:" *State v. Northern Pac. Ry. Co.*, 36 Minn. 207 (30 N. W. 663); *Railroad Co. v. Maryland*, 21 Wall. (U. S.) 456 (22 L. Ed. 678). This is the effect of the decision in *Lakin v. Railroad Co.*, 13 Ore. 436 (11 Pac. 68; 57 Am. Rep. 25), in which Mr. Justice Lord says: "A railroad corporation organized under it (the general law) has no authority, without the consent of the legislature, to lease its road, and that, when it has done so,



it is responsible to the public for the manner of operating the road. As to the public, those operating it must be regarded as agents of the corporation." Where a corporation "has granted to it by charter a franchise intended in large measure to be exercised for the public good the due performance of those functions being the consideration of the public grant, any contract which disables the corporation from performing those functions which undertakes, without the consent of the State, to transfer to others the rights and powers conferred by the charter, and to relieve the grantees of the burden which it imposes, is a violation of the contract with the State, and is void as against public policy." *Thomas v. Railroad Co.*, 101 U. S. 71, 83 (25 L. Ed. 950). In *Railroad Co. v. Winans*, 17 How. (U. S.) 30, 39 (15 L. Ed. 27), it is said: "This conclusion (argument) implies that the duties imposed upon the plaintiff by the charter are fulfilled by the construction of the road, and that by alienating its right to use, and its powers of control and supervision, it may avoid further responsibility. But those acts involve an overturn of the relations which the charter has arranged between the corporation and the community. Important franchises were conferred upon the corporation to enable it to provide the facilities of communication and intercourse required for the public convenience. Corporate management and control over these were prescribed, and corporate responsibility for their insufficiency provided, as a remuneration to the community for their grant. The corporation cannot absolve itself from the performance of its obligations without the consent of the legislature." In *Black v. Canal Co.*, 22 N. J. Eq. 130, 399, the court say: "It may be considered as settled that a corporation cannot lose or alien any franchise or any property necessary to perform its obligations and

duties to the State without legislative authority." See, also *Toll Road Co. v. People ex rel.* 22 Colo. 429 (45 Pac. 398; 37 L. R. A. 711); *Penn Co. v. St. Louis R.*, 188 U. S. 290 (6 Sup. Ct. 1094; 30 L. Ed. 83); *Chicago Gaslight Co. v. People's Gaslight Co.*, 121 Ill. 530 (13 N. E. 169); *Stewart's Appeal*, 56 Pa. 413. The right of a corporation to transfer its franchises was the only issue involved in *Oregon Ry. Co. v. Oregonian Ry. Co.*, 130 U. S. 1 (9 Sup. Ct. 409; 32 L. Ed. 837), under the general statute of 1862, the one involved here, and, after a thorough examination thereof, holds that it did not authorize a corporation to sell or lease its entire property, franchises, and powers to another company.

Counsel for defendant seem to claim something from the amendments of the act construed in that case: Deady's Gen. Laws, p. 659, c. 8, §5. Section 5 thereof (B. & C. Comp. §5056) was amended in 1878 (Laws 1878, p. 90, §1) by adding to subdivision 4 a clause giving a corporation power to receive and dispose of property donated to it for the purpose of aiding the objects of such corporation, but has no reference to the disposition of its franchises. This section was again amended in 1887 (Laws 1887, p. 14, §1) by adding subdivision 7, which relates only to railroads, and evidently for the purpose of avoiding the effect of the ruling in *Oregon Ry. Co. v. Oregonian Ry. Co.*, 130 U. S. 1 (9 Sup. Ct. 409; 32 L. Ed. 837), and also in recognition of the fact that at that time a corporation could not transfer its franchise, and neither of these amendments aid defendant here, and the act of 1905, authorizing corporations to transfer their property and franchise, can have no bearing upon this case."

Such is the case at bar, for the public was interested

in the maintenance and operation of the railroad in question. The company owed a public duty to operate its road, including that portion on Fourth Street, in accordance with the rights granted, and it could not discontinue the operation of such road without legislative authority, nor could it assign its rights and obligations without legislative authority. The reason for this is apparent, because if it had the power to assign its rights and obligations without legislative authority, it could terminate its duty to operate and maintain its road by making an assignment to an irresponsible company.

Counsel for the railroad company contend that Sections 5068 to 5070 of B. & Co.'s Code authorize a transfer of the Oregon Central Railroad Company's rights. A reading of these sections will show that they do not have that effect. These sections appear to apply generally to all corporations whether private business corporations, or quasi public corporations, such as railroads, but there is no express provision exempting railroad companies from the necessity of obtaining legislative consent for the transfer of their public rights. The provision authorizes a disposition of corporate assets upon a dissolution of the corporation, but was not intended to authorize a railroad company to make a disposition of its public rights without public consent, and in view of the principle of statutory construction above alluded to in our opinion it must be held that this provision of the statute authorizing a disposition of corporate assets upon dissolution does not abolish the common law rule requiring legislative consent for the transfer of public duties, but only authorizes a transfer of public rights upon legislative consent.

Counsel for the railroad company next contend that Section 106 of the present City Charter ratified and confirmed the alleged assignment from the Oregon & California Railroad Company. This section, however, cannot reasonably be given such construction. It merely provides that franchises theretofore granted should not be annulled or in anywise affected by the adoption of the new charter.

On page 112 of their brief, Counsel contend that Ordinance No. 16491 recognizes the validity of the alleged assignment by declaring it unlawful for the Oregon Central Railroad Company, its successors, assigns or lessees to run or operate steam locomotives or freight cars over, upon or along Fourth Street. Counsels' contention is not well founded, because Section 3 of the ordinance clearly indicates the legislative intent not to recognize the validity of any pretended assignment, for it is there provided that the ordinance shall not be construed so as to recognize assent to, confirm, ratify or extend any right, franchise or privilege.

Counsel assert that this latter provision is void on the ground that it is in conflict with affirmative provisions of the ordinance. Such, however, is not the fact, for the ordinance clearly shows the intent of the Council to prohibit any person or corporation from running engines and freight trains upon Fourth Street after the expiration of eighteen months from the adoption of the ordinance, and Section 3 is inserted for the express purpose of preventing such action from having any effect to acknowledge or confirm the validity of the pretended rights of appellant to occupy this street.



Counsel next contend that the City has ratified the alleged assignment, and is estopped to claim that appellant has no rights thereunder. The basis of this contention, as set forth on pages 129 to 131 of their brief, is that the City has required the Oregon & California Railroad Company to repave the street, and otherwise comply with the terms of Ordinance No. 599. The only evidence referred to in this connection is pages 426 to 429 of the transcript. This reference, however, fails to disclose any evidence which in our opinion supports Counsel's contention. The evidence referred to shows that in 1893, the City Council authorized the Oregon & California Railroad Company to lay a side track on Fourth Street to accommodate the Union Meat Company. It is doubtful from the evidence whether this side track is at all connected with the track on Fourth Street authorized by Ordinance No. 599. The side track begins ten feet north of the north line of Hoyt Street and runs westerly and southerly along Fourth Street, and twenty-three feet west of the center of Fourth Street to the north line of Glisan Street, whereas the railroad authorized by Ordinance No. 599 runs from the southerly line of the City along Fourth Street to the north line of G Street, which is now Glisan Street, and as much further north as said Fourth Street may extend or be extended. It does not appear whether Fourth Street extended, or has been extended to a point ten feet north of the north line of Hoyt Street, nor does it appear that the side track has any reference to the track on Fourth Street. We therefore fail to see how it can be contended that the adoption of this ordinance author-

izing a side track had any effect to ratify or confirm the alleged assignment by the Oregon Central Railroad Co. to the Oregon & California Railroad Co. Counsel fail to refer to any testimony where the City required the Oregon & California Railroad Company to improve the street occupied by the railroad, and if there was any evidence to that effect, it would not prove a ratification of the alleged assignment or estop the City from disputing the same, because it is a settled principle of law that any railroad company occupying a street is required to keep in good repair that portion of the street occupied by it, irrespective of any agreement so to do.

Reading v. Traction Co., 215 Pa. 250, 255;

Warster v. R. R. Co., 50 N. J. L. 203;

Ry. Co. v. Hoboken, 41 N. J. L. 71;

Ry. Co. v. State, 87 Tenn. 746;

Elliott on Roads and Streets, (2d ed. Sec. 1096a.

Any action of the City, therefore, was merely an enforcement of a common law obligation, and not a recognition of any pretended assignment.

Counsel for appellant next contend on pages 151 to 153 of their brief that the railroad on Fourth Street is a part of the road designated and required by the Congressional Act of 1870, and that the operation of this road as a commercial road necessarily includes the use of steam locomotives and freight trains.

A reference, however, to the act referred to shows that Counsels' contention is not true, because the act



does not require the road to be built on Fourth Street. Indeed, it makes no reference whatever to Fourth Street, or any other street in the City of Portland. It merely refers to a road from Portland to McMinnville. There is not a word of evidence tending to show that it was necessary to build a line on Fourth Street, in order to run from Portland to McMinnville. The road might have terminated in the southerly portion of the City or taken some other route through the City. Neither is it necessary to operate by means of steam locomotives. The Court will take judicial notice of the fact that electric engines are now available, and very largely used both for passenger and freight traffic on other roads of this character.

We also call the Court's particular attention to the fact that the Council in adopting Ordinance No. 16491 allowed ample time for appellant to install electric or gasoline motors for the operation of its passenger trains, and to construct the necessary branch for routing its freight trains through another portion of the City.

We submit that in view of the great annoyance, public delay and inconvenience occasioned by the operation of steam locomotives and freight trains on Fourth Street through the heart of the City, and the danger occasioned to life and property, the City Council has acted with a great deal of forbearance and consideration toward the railroad company in allowing as much time as a year and a half within which to make the necessary changes in order to comply with this ordinance.

It is next contended by Counsel for appellant that in

any event, the portion of Ordinance No. 16491 prohibiting the operation of freight trains on Fourth Street at any time during the day is unreasonable and void, and that this renders the entire ordinance void. Counsel would apparently have the Court believe that it is absolutely necessary to operate freight trains on Fourth Street. Such is by no means the fact. If it were a fact, which it is not, that the company had no means of delivering its freight into the City or to other railroads and steamships, except by operating its line on Fourth Street, it might be necessary for it to establish a freight depot in the southerly portion of the City and make the transfer by other conveyance rather than continue the operation of its freight trains through the heart of the City to the great inconvenience, annoyance and danger to the public.

The Court, however, will not presume that Fourth Street is the only place available to the company for operating freight trains. (Abstract of Record, page 404.)

Neither would the entire ordinance be void if that portion relating to freight trains were found invalid. The rule of statutory construction is that the remaining portions of a statute or ordinance will stand even if some parts thereof be found void, unless it shall appear that the void portion is so intimately and essentially connected with the remaining portion that the Court can say that the Legislature or Council would not have adopted the remaining portion of the statute or ordinance.

The ordinance in question is aimed at two separate and distinct things (1) the operation of steam locomotives, and (2) the operation of freight trains on Fourth Street. It cannot be said that the Legislature would not have prohibited the operation of locomotives if it had been advised that it could not prohibit the operation of freight trains.

We therefore submit, (1) that the ordinance prohibiting the operation of locomotives and freight trains cannot be declared void, even if the Court should disagree with the City Council as to its reasonableness, unless the Court should further find that the ordinance was not adopted as a police regulation, but was intended, and is a destruction of property under a mere pretense or guise of police regulation; (2) that the evidence in this case shows not only that the Council acted in good faith in the exercise of its police powers, but that its action in this matter was reasonable and, indeed, highly conservative and considerate of the railroad company's interest, and, in our opinion, even lax with respect to the interest of the public; (3) that in any event, Ordinance No. 599 and Section 6842 L. O. L. did not create a franchise right, but Section 6842 was merely an enabling act authorizing the construction of the railroad upon such street as the City might designate, and neither this act nor Ordinance No. 599 expressly authorized the operation of locomotives and freight trains. On the contrary, Ordinance No. 599 reserved the right to the City to adopt further regulations with reference to the use of such railroad, and this reservation was a reservation of police power which the City under its present charter could exercise without such reservation. (4) That the

Oregon & California Railroad Company, in whose shoes appellant stands, acquired no legislative consent to the pretended assignment of the rights given by Ordinance No. 599 and Section 6842 of Lord's Oregon Laws, and appellant, therefore, has no standing in Court to claim that a vested right has been impaired.

### SUMMARY.

We, therefore, summarize our conclusions as follows:

**FIRST:** That Sections 6841 and 6842, Lord's Oregon Laws, granted a conditional license, and coupled with Ordinance No. 599 such rights are terminable at the election of either party.

**SECOND:** That the Oregon Central Railroad Company, incorporated as it was under the laws of Oregon and the reserved power of the Constitution, took its charter subject to the police power and that the subsequent enactments of the legislature conferring a charter on the City of Portland are applicable to that corporation.

**THIRD:** That Ordinance No. 599 does not constitute an irrevocable franchise or contract, but simply constitutes a conditional license which can be altered, impaired or modified.

**FOURTH:** That the Oregon Central Railroad Company, in its acceptance of the provisions of Ordinance No. 599 assumes the burdens imposed thereby and must

conform thereto, no matter how irksome such conditions may be.

**FIFTH:** That it is within the reasonable exercise of the police power of the City or State to prohibit the operation of steam locomotives on Fourth Street or the movement of freight traffic on such street, and that such a prohibition is a reasonable regulation either under the reserved power of Ordinance No. 599 or under the police power.

**SIXTH:** That the enactment of Ordinance No. 16491 is not an interference with interstate commerce.

**SEVENTH:** That the prohibiting of steam as a motive power does not deprive the complainant of the right to use other motive power.

**EIGHTH:** That whatever rights were given under Sections 6841 and 6842 and Ordinance No. 599, were not assignable, and such assignment was illegal and void and was not ratified by the State of Oregon or the City of Portland.

**NINTH:** That the Oregon Central Railroad Company, and its successors in interest, have no perpetual franchise or easement on Fourth Street.

**TENTH:** That Ordinance No. 16491 in no manner violates any obligation, if any was imposed, of the Oregon Central Railroad Company, and its successors, by the Act of Congress of May 4, 1870.



**ELEVENTH:** That Ordinance No. 16491 does not impair any vested property right of complainant, nor does it deprive it of its property without due process of law.

**TWELFTH:** That the evidence in the case discloses that the Council in the enactment of Ordinance No. 16491 showed considerable forbearance to the complainant,—gave it a reasonable time in which to employ modern motive power on Fourth Street and that such ordinance was not arbitrarily or capriciously enacted.

**THIRTEENTH:** That the evidence discloses the fact that complainant was building the Beaverton cut-off at the time the case was tried in order to take its freight traffic off of Fourth Street and the fact is, and we think it will be admitted by complainant, that it has obeyed Ordinance No. 16491 in that respect.

**FOURTEENTH:** That Sections 6841 and 6842 having been construed together by the Oregon Supreme Court, such construction should be adopted by this Court, and that the City had power in enacting Ordinance No. 599 to impose the conditions therein contained.

**FIFTEENTH:** That under any circumstances, the City could not contract away its police power to such an extent that it could not regulate the operation of a steam railroad on its streets when it became in fact a nuisance.

For these reasons, we most respectfully submit that the decree of the court below should be affirmed.

FRANK S. GRANT,  
LYMAN E. LATOURETTE,  
Counsel and Attorneys for Appellee. X



